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VOLUME I

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ENCYCLOPÆDIA

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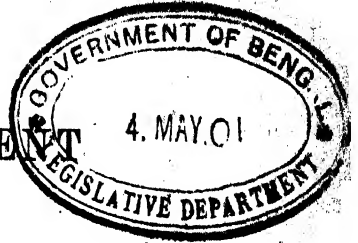
LAWS OF ENGLAND

BEING A

NEW ABRIDGMENT

BY THE

MOST EMINENT LEGAL AUTHORITIES



UNDER THE GENERAL EDITORSHIP OF

A. WOOD RENTON, M.A., LL.B.

OF GRAY'S INN, AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW

VOLUME I

WITH A GENERAL INTRODUCTION BY SIR F. POLLOCK, BART.

ABANDONMENT TO BANKRUPTCY

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The Articles in this Volume have been
Revised by their respective Authors as at
January 1st, 1897.

TO
THE RIGHT HONOURABLE HARDINGE, BARON HALSBURY
LORD HIGH CHANCELLOR OF GREAT BRITAIN
THIS
ENCYCLOPÆDIA OF THE LAWS OF ENGLAND
IS
BY PERMISSION
MOST RESPECTFULLY DEDICATED



THE AUTHORS OF THE PRINCIPAL ARTICLES IN THIS VOLUME
ARE AS FOLLOWS:—

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- Abatement, Plea of.*—W. BLAKE ODGERS, Q. C. *Admiral;*
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Autrefois Attaint; and
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Balance of Power.—THOMAS BARCLAY.
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Banc.—T. J. BULLEN.
Banishment.—W. H. DUCKWORTH.
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Bank Note;
Bank of England;
Bank Shares;
Banker and Customer; and
Banks and Banker.—D. M. KERLY.
Bankruptcy.—E. MANSON.



**AN ALPHABETICAL TABLE OF ABBREVIATIONS OF REFERENCES
TO ENGLISH REPORTS, ETC., USED IN THIS WORK AND IN
LAW REPORTS AND TEXT-BOOKS GENERALLY.**

A. (s.) B. (b.)	A. front, B. back of a leaf	B. D. & O.	Blackham, Dundas, and Osborne, N. P., Ireland
Abr. Ca. Eq.	Abridgment of Cases in Equity	B. & L.	Browning and Lushington's Admiralty Reports
A. C.	Appeal Court, Chancery, Appeal Cases	B. P. B.	Paper Book of Buller
Acc. or Agr.	Accord or agrees	B. R.	King's Bench
Act.	Acton's Reports, Prize Causes	Bac. Abr.	Bacon's Abridgment.
Act. Can.	Acta Cancellaria, by Monro	Ball & B.	Ball and Beatty's Reports, Chancery, Ireland
Act. Reg.	Acta Regia	Banc. Sup.	Upper Bench
Ad. & E.	Adolphus and Ellis's Reports, K. B.	Bar. & Arn.	Barron and Arnold's Election Cases
Ad. & E. N. S.	Adolphus and Ellis's K. B., New Series	Bar. & Aust.	Barron and Austin's Election Cases
Add. E. R.	Addams's Ecclesiastical Reports	Bar Rep.	Bar Reports
A. & H.	Arnold and Hodges' Q. B. Reports	Barn. & Ald.	Barnewall and Alderson's Reports, K. B.
Adm. ●	Admiralty	Barn. & Adol.	Barnewall and Adolphus's Reports, K. B.
Al. & Nap.	Alcock and Napier, K. B., Ireland	Barn. & Cress.	Barnewall and Cresswell's Reports, K. B.
Alc. Reg. C.	Alcock's Registry Cases, Ireland	Barn. K. B.	Barnardiston's Reports, K. B.
Aleyn	Aleyn's K. B.	Barn. Ch.	Barnardiston's Reports, Chancery
Amb.	Ambler's Reports, Chancery	Barnes	Barnes's Notes, C. P.
And.	Anderson's Reports, C. P.	Batt.	Batty's Reports, K. B., Ireland
Andr.	Andrew's Reports, K. B.	Beat.	Beatty's Chancery Reports, Ireland
Anst.	Anstruther's Reports, Exch.	Beav.	Beavan's Reports, Rolls Court
A. P. B.	Ashurst J., Paper Book	Beav. & Wal.	Beavan and Walford Parly.
App. Cas.	Appeal Cases		
A. R.	Anno Regni		
Anon.	Anonymous		
Arch. Abr.	Archbold's Poor Law Cases P. L.		
Arms. M. & O.	Armstrong, Macartney, and Ogle's Reports, N. P., Ireland	Bel.	Bellewe's Reports, K. B.
Arn.	Arnold's Reports	Bel. App.	Bell's Cases on Appeal from Scotland
Arn. & H. Q. B.	Arnold and Hodges, Q. B.	Bell's C. C.	Bell's Crown Cases
Asp.	Aspinall's Maritime Cases	Belt Sup.	Belt's Supplement to Vesey, senr.
Ass.	Book of Assize	Benl.	Benloe or Bendloe's Reports, K. B.
Ast. Ent.	Aston's Entries	Benl. & Dal.	Benloe and Dalison's Reports, C. P.
Atk.	Atkyn's Reports, Chancery	Bern. Church	Bernard's Church Cases, Ireland
Aust.	Austin's County Court Cases	Bing.	Bingham's Reports, C. P.
Auth.	Authentica	Bing. N. C.	Bingham's New Cases, C. P.
		Bittl. Chamb.	Bittleston's Chambers Reports
		Bittl. Rep.	Bittleston's Practice Cases
		Bittl. Prac. Cas.	Bittleston's Practice Cases
B. & B.	Broderip and Bingham's Reports, C. P.		
B. & S.	Best and Smith's Reports, Q. B.		

TABLE OF ABBREVIATIONS

Bky. & Insol.	Bankruptcy and Insolvency	Ca. temp. H.	Cases time Hardwicke, K. B.
Cas.	Cases	Cairns' Dec.	Cairns' Decisions, Reilly
Black. J. P.	Blackerby's Justice of the Peace Cases	Cal. Ch. Proc.	Calendars of Proceedings in Chancery
Black. W.	Sir Wm. Blackstone's Reports, K. B.	Cald.	Caldecott's Reports, K. B.
Black. H.	Henry Blackstone's Reports, C. P.	Calth.	Calthrop's Reports, K. B.
Bli.	Bligh's Reports, House of Lords	Cam. Scacc.	Camera Scaccarii (Exchequer Chamber)
Bli. N. S.	Bligh's Reports, New Series	Camp. N. P.	Campbell's Reports, Nisi Prius
Bos. & Pul.	Bosanquet and Puller's Reports, C. P.	Car. & Kir.	Carrington and Kirwan's Reports, N. P.
Bos. & P. N. R.	Bosanquet and Puller's New Reports, C. P.	Car. & M.	Carrington and Marshman
Bott P. L.	Bott's Poor Law Cases	Car. & P.	Carrington and Payne's Reports, N. P.
Br. Brev. Jud.	Brownlow Brevia Judicialia, etc.	Carp. P. C.	Carpmael's Patent Cases
Br. Eccl.	Brooke's Ecclesiastical Cases	Cart.	Carter's Reports, C. P.
Br. N. C.	Brooke's New Cases, K. B.	Cart. T. M. Cas.	Cartmell's Trade Mark Cases
Brac. N. B.	Bracton's Note Book	Carth.	Carthew's Reports, K. B.
Bridg. (J.)	Bridgman's (J.) Reports, C. P.	Cary	Cary's Reports, Chancery
Bridg. O.	Orlando Bridgman's Reports, C. P.	Ca. t. Talb.	Cases time Talbot, Chancery
Bro. Ab.	Brooke's Abridgment	Ca. Pra. C. P.	Cases of Practice Common Pleas
Bro. Ent.	Brown's Entries	Ca. Six Cir.	Cases on the Six Circuits, Ireland
Bro. C. C.	Brown's Chancery Reports (Eden or Belt)	Ca. Parl.	Cases in Parliament
Bro. P. C.	Brown's Parliament Cases	Ca. C. L.	Cases in Crown Law
Brod. & Fre.	Broderick and Fremantle Ecclesiastical Cases	Ca. Pra. K. B.	Cases of Practice in King's Bench
Brod. & B.	Broderip and Bingham's Reports, C. P.	Ch. Cas.	Cases in Chancery
Brownl. Redv.	Brownlow's Redivivus	Ch. Cas. Ch.	Choice Cases in Chancery
Brownl.	Brownlow and Goldsborough's Reports, C. P.	Ch. D.	Law Reports, Common Pleas Division
Buck	Buck's Reports in Bankruptcy	Ch. Pre.	Precedents in Chancery
Bull. N. P.	Buller's Nisi Prius	Ch. R.	Reports in Chancery
Bulst.	Bulstrode's Reports, K. B.	Charl. Pr. Cas.	Charley's Practice Cases
Bunb.	Bunbury's Reports, Ex.	Chit.	Chitty's Reports, Bail Court
Burr.	Burrow's Reports, K. B.	Cl. H. L.	Clark's House of Lords Cases
Burr. S. C.	Burrow's Settlement Cases	Cl. & Fin.	Clark & Finnelly's Reports, House of Lords
C. B.	Common Bench Reports, or Manning, Granger, and Scott's Reports	Cl. Ass.	Clerk's Assistant
* C. B. N. S.	Common Bench Reports, New Series	Clay.	Clayton's Reports, York Assize
C. C. A.	County Court Appeals	Cliff. & Rick.	Clifford & Rickards, Locus Standi Reports
C. C. R.	Crown Cases Reserved	Cliff. & Steph.	Clifford & Stephens, Locus Standi Reports
C. & E.	Cababé and Ellis, Q. B.	Clift	Clift's Entries
C. & M.	Crompton and Meeson's Reports, Ex.	Cod. Jur. Civ.	Codex Juris Civilis
C. M. & R.	Crompton's Meeson and Roscoe's Reports, Ex.	Co. Ent.	Coke's Entries
C. P.	Common Pleas	Co. Lit.	Coke on Littleton (1 Inst.)
C. P. D.	Law Reports, Common Pleas Division	Co. M. C.	Coke's Magna Charta (2 Inst.)
C. Theod.	Codex Theodosiani	Cock. & Rowe	Cockburn & Rowe's Election Cases
Ca.	Case, or Placita	Co. P. C.	Coke's Pleas of the Crown (3 Inst.)
Ca. & Opin.	Cases and Opinions of Eminent Counsel	Co. on Courts	Coke's 4 Inst.
Ca. Set. t. Holt	Cases of Settlement temp. Holt	Col. C. C.	Collyer's Chancery Cases
		Colles	Colles's Cases in Parliament
		Coll. Jurid.	Collectanea Juridica
		Colt.	Coltman's Registration Cases
		Comb.	Comberbach's Reports, K. B.
		Com.	Comyns's Reports, K. B. and C. P.
		Com. Cas.	Reports of Commercial Cases by Mathew
		Com. Dig.	Comyns's Digest
		Com. L. R.	Common Law Reports

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Con. & Law.	Connor & Lawson's Reports, Chancery, Ireland	Dears. C. C.	Dearsley's Crown Cases
Con. Cust.	Conroy's Custodian Reports	Dears.&B.C.C.	Dearsley and Bell's Crown Cases
Cont.	Contra	De G.	De Gex's Bankruptcy Reports
Cooke	Cooke's Common Pleas Reports	De G., F. & J.	De Gex, Fisher and Jones's
Cooper	Cooper's Reports, Chancery	Ch.(orBky.)	Reports, Chancery (or Bankruptcy)
Co. Rep.	Coke's Reports, K. B.	De G. & J. Ch.	De Gex and Jones's Reports,
Coop. & Cott.	Cooper temp. Cottenham	(or Bky.)	Chancery (or Bankruptcy)
Coop. (C. P.)	Cooper (C. P.) Reports, Chancery	De G., J. & S.	De Gex, Jones and Smith's
Coop. & Brough.	Cooper's Cases, temp. Brougham	Ch.(orBky.)	Reports, Chancery (or Bankruptcy)
Coop.	Cooper (G.), Chancery	De G., M. & G.	De Gex, Macnaghten and
Coo. & Al.	Cooke & Alcock's Reports, K. B., Ireland	Ch.(orBky.)	Gordon's Reports, Chancery (or Bankruptcy)
Corb. & D.	Corbett & Daniell, Election Cases	De G. & Sm.	De Gex and Smale's Reports, Chancery
Cot.	Cotton	Delane.	Delane's Revision Courts
Cowp.	Cowper's Reports, K. B.	Den. Cr. C.	Denison's Crown Cases
Cox	Cox's Reports, Chancery	Dick.	Dickens' Reports, Chancery
Cox C. C.	Cox's Criminal Cases	Doct. Pl.	Doctrina Placitandi
Cox M. C.	Cox's Magistrates' Cases	Dod.	Dodson's Reports in Admiralty
Cox Jt. Stk. Ca.	Cox's Joint Stock Cases	Don.	Donnell's Land Act Reports, Ireland
Cox Cty. Cts. Ca.	Cox's County Courts Equity and Bankruptcy Cases	Donn. Eq.	Donnelly's Chancery Cases
Cox & Atk.	Cox & Atkinson's Registration Cases	Dow	Dow's House of Lords Cases
Cr. & Ph.	Craig and Phillips, Chancery	Doug. Elect.	Douglas's Election Cases
Cr. & St.	Craigie and Stewart's Reports, House of Lords	Doug. K. B.	Douglas's Reports, K. B.
Craw. & D.	Crawford and Dix's Circuit Cases, Ireland	Dow & C.	Dow and Clark, House of Lords Cases
Craw. & D. Ab. C.	Crawford and Dix's Abridged Cases, Ireland	Dow. & L.	Dowling and Lowndes, Bail Court Reports
Cress.	Cresswell's Insolvency Reports	Dow. & Ry.	Dowling and Ryland's K. B. Reports
Cripps	Cripp's Clergy Cases	Dow. & Ry. M. C.	Dowling and Ryland's Magistrates Cases
Cro. (1, 2, 3)	Croke (Eliz., Jam., Cha.), K. B. and C. P.	Dow.&Ry.N.P.	Dowling and Ryland's Nisi Prius
Crompt. & J.	Crompton & Jervis's Reports, Ex.	Dowl. P. C.	Dowling's Practice Cases, Bail Court
Cty. Cts. Cas.	County Courts Cases	Dr. & Wal.	Drury and Walsh, Chancery Reports, Ireland
Cty. Cts. Chron.	County Courts Chronicle	Dr. & War.	Drury and Warren, Chancery Reports, Ireland
Cty. Cts. Rep.	County Courts Reports	Drew.	Drewry's Reports, Chancery
Cunn.	Cunningham's Reports, K. B.	Drew. & Sm.	Drewry and Smale's Reports, Chancery
Curt.	Curteis's Ecclesiastical Reports	Drinkw.	Drinkwater's Reports, C. P.
D. & M.	Davison and Merivale's Q. B. Reports	Drury t. N.	Drury temp. Napier
D. N. S.	Dowling, New Series, Bail Court Reports	Drury Ch.	Drury's Reports, Chancery Ireland
D. P. B.	Dampier, J., Paper Book	Dub.	Dubitatur
Dal.	Dalison's Reports, C. P.	Dy.	Dyer's Reports, K. B.
Dale	Dale's Ecclesiastical Reports		
D'An.	D'Anvers's Abridgment		
Dan.	Daniell's Reports, Ex. Eq.		
Dan. & Ll.	Danson and Lloyd, Mercantile Cases	Eag. & Yo.	Eagle and Younge's Tithe Cases
Dav.	Davy's Reports, Ireland	East	East's Reports, K. B.
Dav. Pat. Cas.	Davies' Patent Cases	P. C.	East's Pleas of the Crown
Day. El. Cas.	Day's Election Cases	Eden	Eden's Rep. of Northington's Cases, Chancery
Dea. & Sw.	Deane and Swabey's Reports, Probate and Divorce	Edw. A. R.	Edwards' Admiralty Reports
Deac.	Deacon's Bankruptcy Cases	El. B. & E.	Ellis, Blackburn and Ellis's Reports, Q. B.
Deac. & Ch.	Deacon and Chitty, Bankruptcy Reports	El. & Bl.	Ellis and Blackburn's Reports, Q. B.
Deane	Deane's Ecclesiastical Cases		

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El. & El. . . .	Ellis and Ellis's Reports, Q. B.	H. P. C. . . .	Hale's Pleas of the Crown
Eq. Rep. . . .	Equity Reports	H. & R. . . .	Harrison and Rutherford's Reports, C. P.
Esp. . . .	Espinasse's Reports	Ha. & Tw. . .	Hall and Twells's Chancery Reports
Ex. Rep. . . .	Welsby, Hurlstone and Gordon's Reports	Had. . . .	Earl of Haddington's Reports, Court of Session
Ex. D. . . .	Law Reports, Exchequer Division	Hag. Adm. . .	Haggard's Admiralty Reports
		Hag. Con. . .	Haggard's Consistory Reports
		Hag. Ec. . . .	Haggard's Ecclesiastical Reports
F. B. C. . . .	Fonblanque's Bankruptcy Cases	Hans. . . .	Hansard's Entries
F. & F. . . .	Foster and Finlason's Reports, Nisi Prius	Har. & W. . .	Harrison & Wollaston's Bail Reports
Falc. & Fitz. .	Falconer and Fitzherbert, Election Cases	Hard. . . .	Hardres' Reports, Ex.
Fin. . . .	Finch's Reports, Chancery	Hare	Hare's Reports, Chancery
Fin. Prec. . .	Finch's Precedents in Chancery	Hawk. P. C. .	Hawkins' Pleas of the Crown
Fitz. . . .	Fitzherbert	Hay & M. . .	Hay and Marriott's Admiralty Reports
Fitz-G. . . .	Fitz-Gibbon's Reports, K. B.	Hayes	Hayes's Reports, Exchequer, Ireland
Flan. & K. . .	Flanagan and Kelly's Reports, Rolls, Ireland	Hayes & J. .	Hayes and Jones's Reports, Exchequer, Ireland
Foley	Foley's Poor Law Cases	Hem. & M. . .	Hemming and Miller, Chancery
For. . . .	Forrest's Reports, Ex.	Het. . . .	Hetley's Reports, C. P.
Fort. de Laud	Fortescue de Laudibus Angliæ Legum	Hil. . . .	Hilary Term
Fortes. . . .	Fortescue's Reports, K. B.	Hob. . . .	Hobart's Reports, K. B.
Post. . . .	Foster's Reports, Crown Law	Hod. . . .	Hodge's Reports, Common Pleas
Fox Reg. . . .	Fox and Smith's Registration Cases	Hog. . . .	Hogan's Reports, Rolls, Ireland
Fox & S. . . .	Fox and Smith's Reports, K. B., Ireland	Holt	Holt's Reports, K. B.
Fras. . . .	Fraser's Election Cases	Holt Eq. . . .	Holt's Equity Reports
Free. Chy. . .	Freeman's Chancery Reports	Holt N. P. . .	Holt's Nisi Prius Reports
Freem. K. B. .	Freeman's Reports, K. B.	Hop. & C. . .	Hopwood and Coltman, Registration Appeal Cases
		Hop. & P. . .	Hopwood and Philbrick, Registration Appeal Cases
		Horn & H. . .	Horn & Hurlstone's Exchequer Reports
G. & J. . . .	Glynand Jameson, Bankruptcy Reports	Hov. Suppl. .	Hovenden's Supplement to Vesey, jun.
Gal. & Dav. . .	Gale and Davison's Reports, K. B.	How. St. Tr. .	Howell's State Trials
Gale	Gale's Exchequer Reports	Hud. & B. . .	Hudson and Brooke's Reports, K. B., Ireland
Gaz. B. . . .	Gazette of Bankruptcy	Hugh. . . .	Hughes's Entries
Gif. . . .	Giffard's Reports, Chancery	Hunt	Hunt's Annuity Cases
Gilb. Eq. . . .	Gilbert's Cases in Law and in Equity	Hurl. & W. .	Hurlstone & Walmsley Exchequer Reports
" Ch. . . .	" Reports, Chancery	Hut. . . .	Hutton's Reports, C. P.
Glanv. . . .	Glanville Election Cases		
Glasc. . . .	Glascok's Reports in all the Courts, Ireland	I. R. Eq. . . .	Irish Reports, Equity Series
Godb. . . .	Godbolt's Reports, K. B.	In F. . . .	<i>In fine.</i> At the end of a title, law, or a paragraph.
Godol. . . .	Godolphin	In Pr. . . .	<i>In principio.</i> In the beginning, and before the first paragraph of a law
Golds. . . .	Goldsborough's Reports, K. B.	Ins. . . .	Insurance
Good. Pat. Cas.	Goodeve's Patent Cases	Ind. App. . .	Law Reports, Indian Appeals
Gow	Gow's Nisi Prius Cases	Ind. App. . .	Law Reports, Supplemental
Grif. . . .	Griffith's Poor Rate Cases	Supp. . . .	Indian Appeals
Grif. Pat. Cas.	Griffin's Patent Cases	Ir. Jur. . . .	Irish Jurist
Gwm. . . .	Gwillim's Tithe Cases	Ir. Ch. . . .	Irish Chancery Reports
		Ir. Com. L. .	Irish Common Law Reports
H. & C. . . .	Hurlstone and Coltman's Reports, Ex.	Ir. Eq. . . .	Irish Equity Reports
H. & N. . . .	Hurlstone and Norman's Reports, Ex.	Ir. L. . . .	Irish Law Reports
H. L. . . .	House of Lords	Ir. L. Rec. .	Irish Law Recorder

Ir. L. T. . . .	Irish Law Times	. & C. . . .	Leigh and Cave, Crown Cases
Ir. R. C. L. . .	Irish Reports, Common Law Series	. & G. temp. Plunk. . . .	Lloyd and Goold, temp. Plunkett, Chy., Ireland
Ir. R. Eq. . . .	Irish Reports, Equity Series	. J. . . .	Law Journal, Reports in all the Courts
Ir. Reg. App. .	Irish Reports, Registry Appeals	L. M. & P. . . .	Lowndes, Maxwell and Pollock's Rep., Bail Court
J. Ctus. . . .	Jurisconsultus	L. & P. . . .	Lowndes & Pollock
J. P. . . .	Justice of the Peace Periodical	L. P. B. . . .	Paper Book of Lawrence, J.
Jac. . . .	Jacob's Reports, Chancery	L. Rev. . . .	The Law Review
Jac. & W. . .	Jacob and Walker's Reports, Chancery	L. T. . . .	The Law Times, Reports in all the Courts
Jebb C. C. . .	Jebb's Crown Cases, Ireland	L. & Welsb. .	Lloyd and Welsby's Commercial Reports
Jebb & B. . .	Jebb and Bourke's Reports, K. B., Ireland	La. . . .	Lane's Reports, Exchequer
Jebb & S. . .	Jebb and Synnes' Reports, K. B., Ireland	Land Com. Rep. .	Land Commission Reports, Ireland
Jenk. . . .	Jenkins's Reports, Ex.	Lat. . . .	Latch's Reports, K. B.
John. . . .	Johnson's Reports, Chancery	Law Mag. . .	Law Magazine
John. & H. .	Johnson and Hemming's Reports, Chancery	*L. R. Ad. & Ec.	Admiralty and Ecclesiastical Cases
Jones T. . . .	Jones's Reports, K. B.	*L. R. C. C. .	Crown Cases Reserved
Jones W. . .	Jones's Reports, K. B.	*L. R. Ch. . .	Chancery Appeal Cases
Jones Ex. . .	Jones's Reports, Exch., Ireland.	*L. R. C. P. .	Common Pleas Cases
Jones & C. .	Jones and Carey's Reports, Exch., Ireland	*L. R. Eq. . .	Equity Cases
Jo. & Lat. . .	Jones and Latouché's Reports, Chancery, Ireland	*L. R. Ex. . .	Exchequer Cases
Jud. . . .	Judgments, First and Second Book of	*L. R. H. L. .	English and Irish Appeal Cases, House of Lords
Jur. . . .	The Jurist Reports in all the Courts	*L. R. H. L. Sc.	Scotch and Divorce Appeal Cases, House of Lords
Jur. N. S. . .	Jurist, New Series	*L. R. P. C. .	Privy Council Appeal Cases
K. B. . . .	King's Bench	*L. R. P. & D.	Probate and Divorce
K. & G. R. C.	Keane and Grant's Registration Cases	*L. R. Q. B. .	Queen's Bench Cases
Kay . . .	Kay's Reports, Chancery	L. R. Ir. . . .	Law Reports, Ireland
Kay & J. . .	Kay and Johnson's Reports, Chancery	Leg. Ex. . . .	Legal Examiner
Keb. . . .	Keble's Reports, K. B.	Leg. O. . . .	The Legal Observer
Keen . . .	Keen's Reports, Rolls Court	Leach . . .	Leach's Crown Cases
Keilw. . .	Keilway's Reports, K. B.	Lee t. Hard. .	Lee's Cases, temp. Hardwicke, K. B.
Kel. . . .	Sir John Kelyng's Reports, K. B.	Lee Eccl. . . .	Lee's Ecclesiastical Reports
Kel. W. . .	Wm. Kelyng's Rep., 2 parts, Chancery	Leon. . . .	Leonard's Reports, K. B.
Ken. Ld. . .	Kenyon's Reports, K. B.	Lev. . . .	Levinz's Reports, K. B.
Keny. . . .	Kenyon's Notes, by Hanmer, K. B.	Lew. C. C. . .	Lewin's Crown Cases
Kn. . . .	Knapp's Reports, Privy Council	Ley	Ley's Reports, K. B.
Kn. & O. . .	Knapp and Ombler, Election	Lib. Ass. . .	Liber Assisarum Year Book, pt. 5
L. & G. temp. Sugden	Lloyd and Goold temp. Sugden, Chy., Ireland	Lib. Feud. . .	Liber Feudorum, usually printed at the end of the Corpus Juris Civilis
		Lib. Int. . . .	Liber Intratumum
		Lib. Intr. . .	Old Book of Entries
		Lib. Reg. . . .	Register Book
		Lil. . . .	Lilly's Reports
		Lil. Abr. . . .	Lilly's Practical Register
		Lit. . . .	Littleton's Reports, C. P.
		Lit. with S. .	Littleton, S. for Section
		Lofft	Lofft's Reports, K. B.
		Long Quinto .	Year Book, pt. 10, K. B.
		Longf. & T. .	Longfield's and Townsend's Reports, Exch., Ireland
		Lud. E. C. . .	Luder's Election Cases
		Lum. . . .	Lumley's Poor Law Cases

* In citing the Law Reports up to 1875, the number of the volume is placed after the letters L. R., thus:—L. R. 3 H. L. From 1876 to 1890, they are cited thus:—2 Q. B. D. Since 1890, the year has been placed in brackets:—[1894] Ch.

Lush.	Lushington's Admiralty Reports	Moo. C. C.	Moody's Crown Cases
Lut.	Lutwyche's Reports, C. P.	Moo. & M.	Moody and Malkin's Reports, N. P.
Lut. R. C.	Lutwyche's Registration Cases	Moo. P. C.	Moore's Privy Council Cases
		Moo. P. C., o N. S.	Moore's Privy Council Cases, New Series
		Moo. Ind. Ap.	Moore's India Appeals
M. C.	Magistrates' Cases (Law Journal	Moo. & R.	Moody and Robinson's Reports, N. P.
M. D. & D. G.	Montagu, Deacon, and De Gex's Reports, Bankruptcy	Moo. K. B.	J. B. Moore's Reports, K. B.
M. & McA.	Montagu and McArthur's Reports, Bankruptcy	Moo. & P.	Moore and Payne's Reports, C. P.
M. & Ayr. R.	Montagu and Ayrton's Reports, Bankruptcy	Moo. & S.	Moore and Scott's Reports, C. P.
M. & S.	Maule and Selwyn's Reports, K. B.	Moo. C. P.	Moore's Common Pleas Reports
Mac. & G.	Macnaghten and Gordon's Reports, Chancery	Mor. Bky.	Morrell's Bankruptcy Reports
Macn.	Macnaghten's Select Cases	Mos.	Moseley's Reports, Chancery
Macr. & H.	Macrae and Hertslet's Insolvency Cases	Murp. & H.	Murphy and Hurlstone's Exchequer Reports
Macr. P. C.	Macrory's Patent Cases	Myl. & Cr.	Mylne and Craig's Reports, Chancery
Macl. & R.	Maclean and Robinson's Scotch Appeals	Myl. & K.	Mylne & Keen's Reports
Macq. H. L.	Macqueen's Scotch Appeal Cases	N. C.	Notes of Cases in the Ecclesiastical and Maritime Courts
Madd.	Maddock's Reports, Chancery	Nels.	Nelson's Reports, Chancery
Madd. & G.	Maddock and Geldart's Reports (Madd. vol. 6)	Nev. & M. K. B.	Neville and Manning's Reports, K. B.
Madd. Ch.	Maddock's Chancery Practice	Nev. & M. M. C.	Neville and Manning's Magistrates' Cases
Man.	Manning's Revision Cases	Nev. & P. K. B.	Neville and Perry's Reports, K. B.
Man. & G.	Manning and Granger's Reports, C. P.	Nev. & P. M. C.	Neville and Perry's Magistrates' Cases
Man. & R. K. B.	Manning and Ryland's Reports, K. B.	New Rep.	New Reports in all the Courts
Man. & R. M. C.	Manning and Rylands, Magistrates' Cases	New. Mag. Ca.	New Magistrates' Cases, by Bittleston, etc.
Manson	Manson's Bankruptcy and Company Cases	New. Sess. Ca.	New Sessions' Cases, by Carrow, etc.
Mar.	March's Reports, K. B.	New. Pr. Ca.	New Practice Cases
Mars. Adm.	Marsden's Admiralty Cases	No. N.	Novæ Narrationes
Marsh.	Marshall's Reports, C. P.	Nol. Sett.	Nolan's Settlement Cases
McCle.	McClelland's Reports, Ex.	North.	Northington's Reports, by Eden, Chancery
McCle. & Yo.	McClelland's and Young's Reports, Ex.	Noy	Noy's Reports, K. B.
M'Dev.	M'Devitt's Land Reports, Ireland	N. R.	Not Reported
Mee. & W.	Meeson and Welsby's Reports, Ex.	N. S.	New Series
Meg.	Megone's Company Cases	O'M. & H.	O'Malley and Hardcastle's Election Cases
Mer.	Merivale's Reports, Chancery	Ord. Ch.	Orders in Chancery
Milw.	Milward's Reports, Irish Ecclesiastical	Ought.	Oughton's Ordo Judiciorum
Mo.	Moore's Reports, K. B.	Ow.	Owen's Reports, K. B.
Mod. Ca.	Modern Cases		
Mod. Ent.	Modern Entries	Pal.	Palmer's Reports, K. B.
Mod. Int. 1, 2	Modus Intrandi, 1, 2	Par.	Parker's Reports, Ex.
Mod. Rep.	Modern Reports, K. B.	Paton	Paton's Appeal Cases, House of Lords
Mol.	Molloy's Chancery Reports, Ireland	Pat. App. Ca.	Paterson's Appeal
Mont. & B.	Montagu and Bligh's Reports, Bankruptcy	P. C.	Privy Council
Mont. & Chit.	Montagu and Chitty's Reports, Bankruptcy	a.	Peake's Reports, N. P.
Mont. B. C.	Montagu's Reports, Bankruptcy	Peck.	Peckwell's Election Cases
		Per. & Dav.	Perry and Davison's Reports, K. B.

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Per. & K.	Perry and Knapp, Election Cases	Rob.	Robinson's Entries
Ph. Ch.	Phillips's Reports, Chancery	Rob. C.	Robinson's Reports Admiralty
Ph. Elect.	Phillip's Election Cases	Rob. Eccl.	Robertson's Ecclesiastical Reports
Phillim.	Phillimore's Reports, Ecclesiastical	Robert. Ap.	Robertson's Appeal Cases, Scotland
Phillim. Ct. Ar.	Phillimore's Reports, Court of Arches	Rob. W.	Robinson's New Admiralty Reports
Pig. & R.	Pigott and Rodwell's Election Cases	Rolle	Rolle's Reports
Pl. Com.	Plowden's Reports, K. B.	Rom.	Romilly's Notes of Cases
Pla.	Placita	Rose	Rose's Reports, Bankruptcy
Plac. Angl. Nor.	Cases from William I. to Richard I.	Rot. Cur. Reg.	Rotuli Curie Regis
Pol.	Polluxfen's Reports, K. B.	Rot. Parl.	Rotuli Parliamentorum
Poph.	Popham's Reports, K. B.	Rowe	Rowe's Interesting Cases, Ireland
Pow. R. & D.	Power, Rodwell, and Dew's Election Cases	Russ.	Russell's Reports, Chancery
P. R. C. P.	Practical Register in Common Pleas	Russ. & M.	Russell and Mylne's Reports, Chancery
Pr. Co.	Prerogative Court	Russ. & R.	Russell and Rymer's Crown Cases
Pr. Reg. Ch.	Practical Register in Chancery	Ry. F.	Rymer's Fœdera
Pratt	Pratt's Cases on Contraband of War	Ry. & M.	Ryan and Moody, N. P. Reports
Price Ex.	Price's Reports, Exchequer	Ry. & Can. Traf. Cas.	Railway and Canal Traffic Cases, by Browne and Mac-
Pr. Notes	Price's Notes of Practice Cases		
P. Wms.	Peere William's Reports, Chancery	S. §.	Section
		S. B.	Upper Bench
		S. C.	Same Case
		S. P.	Same Point or Principle
		S. & Sm.	Searle and Smith's Reports, Probate and Divorce
Q.	Quorum	Saint	Saint's Registration Cases
Q. Attach.	Quoniam Attachamenta	Salk.	Salkeld's Reports, K. B.
Q. War.	Quo Warranto	Sau. & Sc.	Sausse and Scully's Reports, Rolls, Ireland
Quinti Quinto Year Book, 5 Hen. v.		Saund. & C.	Saunders and Cole, Bail Court Reports
		Saund.	Saunders's Reports, K. B.
		Sav.	Savile's Reports, C. P.
		Say.	Sayers's Reports, K. B.
		Scac.	Scaccaria Curia, Court of Exchequer
R.	The Reports	Sch. & Lef.	Schoale and Lefroy's Reports, Chancery, Ireland
R. Comp. Ca.	Reports of Commission Cases	Scot.	Scott's Reports, C. P.
R. P. C.	Reports of Intest Cases (Official)	Scot. N. R.	Scott's New Reports, C. P.
R. R.	The Revised Reports	Sel. Ca. Ev.	Select Cases relating to Evidence
Rail. C.	Railway Cases, Nicol, Hare, Carew, etc.	Sel. Ca. t. King	Select Cases, Chancery, temp. King
Rast.	Rastell's Entries and Statutes	Sel. Coll. Ca.	Select Collection of Cases, by a Solicitor
Raym. (Ld.)	Lord Raymond's Reports, K. B.	Seld.	Selden
Ray. T.	Sir Thomas Raymond's Reports, K. B.	Sess. Ca.	Sessions Cases concerning Settlements
Ray. Tithe Cas.	Rayner's Tithe Cases	Sh. App.	Shaw's Reports of Appeal Cases, House of Lords
Real Prop. Cas.	Real Property and Conveyancing Cases	Sh. & McL.	Shaw and Maclean's Reports of Appeal Cases, House of Lords
Reg. Jud.	Registrum Judiciale	Show.	Shower's Reports, K. B.
Rep. Ch.	Reports in Chancery	Show. P. C.	Shower's Parliament Cases
Rick. & Saund.	Rickards and Saunders' Locus Standi	Sid.	Siderfin's Reports, K. B.
Ridgw. Ap.	Ridgway's Appeals, Ireland		
Ridg. t. Hard.	Ridgway, temp. Hardwicke, Chancery		
Ridg. L. & S.	Ridgway, Lapp and Schoales' Reports, K. B., Ireland		

TABLE OF ABBREVIATIONS

Sim. & St.	Simons and Stuart's Reports, Chancery	Ves. &	Vesey and Beames's Reports, Chancery
Sim.	Simons's Reports, Chancery	Vet. Entr.	Old Entries
Skin.	Skinner's Reports, K. B.	Vern.	Vernon's Reports, Chancery
Sm. & G.	Smale and Giffard's Reports, Chancery	Vern. & S.	Vernon and Scriven's Reports, K. B., Ireland
Smi. & Bat.	Smith and Betty's Reports, K. B., Ireland	Vid.	Vidian's Entries
Smith J.	Smith's Reports, K. B.	Vin. Abr.	Viner's Abridgment
Smith Reg.	Smith's Registration Cases		
Smythe	Smythe's Reports, C. P., Ireland		
Sol. J.	Solicitors' Journal		
Sp. Eccl. & Adm.	Spink's Ecclesiastical and Admiralty Reports	W. N. . . .	Weekly Notes (Law Reports)
Sp. Prize Ca.	Spink's Prize Causes	W. R. . . .	Weekly Reporter in all the Courts
Sp. & Sel. Ca.	Special and Selected Law Cases	W. & S. Ap. .	Wilson and Shaw's Reports, House of Lords
Star Ch. Ca.	Star Chamber Cases	W. W. & D. .	Willmore, Wollaston, and Davison's Reports, K. B.
Stark. N. P.	Starkie's Reports, N. P.	W. W. & H. .	Willmore, Wollaston, and Hodge's Reports, K. B.
Still.	Stillingfleet's Ecclesiastical Cases	Wallis . . .	Wallis's Reports, Chancery, Ireland
Stra.	Strange's Reports, K. B.	Web. P. C. .	Webster's Patent Cases
Sty. . . .	Style's Reports, K. B.	Welsh . . .	Welsh Registry Cases, Ireland
St. Tri.	State Trials	West H. L. .	West's Reports, House of Lords
Swa. Ad.	Swabey's Admiralty Reports	West Ch. . .	West's Reports, Chancery, temp. Hardwicke
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce	Western . .	Western's Tithe Cases
Swans.	Swanston's Reports, Chancery	Wight. . . .	Wightwicke's Reports, Exchequer
		Wils. Ch. . .	Wilson's Chancery Reports
T. L. R. . .	Times Law Reports	Wils. Ex. . .	Wilson's Exchequer Reports
T. & M. . .	Temple and Mew's Criminal Appeal Cases	Wils. . . .	Wilson's Reports, K. B.
T. R. . . .	Term Reports (Durnford and East), K. B.	Win. . . .	Winch's Reports, C. B.
Taml. . . .	Tamlyn's Reports, Rolls	Willes . . .	Willes's Reports, K. B. and C. P.
Taun. . . .	Taunton's Reports, C. P.	Wilm. . . .	Wilmot's Notes and Opinions, K. B.
Toml. . . .	Tomlin's Election Reports	Wms. Saun. .	William's Notes to Saunder's Reports
Toth. . . .	Tothill's Reports, Chancery	Wood	Wood's Decrees in Tithe Cases
Trin. . . .	Trinity Term	Wolf. & B. .	Wolferstan and Bristow's Election Cases
Turn. . . .	Turner	Wolf. & D. .	Wolferstan and Dew's Election Cases
Turn. & R.	Turner and Russell's Reports, Chancery	Woll. . . .	Wollaston's Bail Court Reports
Tyrw. . . .	Tyrwhitt's Reports, Exchequer		
Tyrw. & G.	Tyrwhitt and Granger's Reports, Exchequer	Y. B. . . .	Year Book
		Y. & C. Ex. .	Younge and Collyer's Eq. Exch.
U. K. . . .	United Kingdom	Y. & C. C. .	Younge and Collyer's Chancery
		Y. & J. . . .	Younge and Jervis's Reports, Exchequer
Vaugh. . .	Vaughan's Reports, C. P.	Yelv. . . .	Yelverton's Reports, K. B.
Vent. . . .	Ventris's Reports, K. B.	You. . . .	Younge, Reports, Exchequer
Ves. . . .	Vesey's, Sen., Reports, Chancery		
Ves. Jun. .	Vesey's, Jun., Reports, Chancery		

A CHRONOLOGICAL LIST OF ENGLISH LAW REPORTS.

	No. of Vols.	Period.		No. of Vols.	Period.
HOUSE OF LORDS.					
Showler	1	1694 to 1699	Vesey, sen., and Belt's Supplement	3	1747 to 1756
Colles	1	1697 to 1714	Eden	2	1757 to 1767
Brown, by Tomlins	8	1702 to 1800	Brown, by Eden	4	1778 to 1794
Dow	6	1812 to 1818	Brown, by Belt	4
Bligh	3	1819 to 1821	Cox	2	1783 to 1796
and Part 1 of Vol. IV. Bligh (New Series)	10	1827 to 1837	Vesey, jun., with Index and Hovenden's Sup.	22	1789 to 1816
and Parts 1, 2, 3, of Vol. XI. Dow and Clark	2	1827 to 1832	Vesey and Beames	3	1812 to 1814
Clark and Finnelly	12	1831 to 1846	Cooper, G., temp. Eldon	1	1815
Maclean and Robinson	1	1839	Merivale	3	1815 to 1817
West	1	1839 to 1841	Swanston	3	1818 to 1819
House of Lords Cases (Clark)	11	1847 to 1866	Jacob and Walker	2	1819 to 1821
— Index to	1	1814 to 1866	Jacob	1	1821 to 1822
			Turner and Russell	1	1822 to 1824
			Russell	5	1823 to 1829
			Only 2 Parts of the 5th Vol. were published.		
PRIVY COUNCIL.			Russell and Mylne	2	1829 to 1831
Acton	1	1809 to 1811	Mylne and Keen	3	1832 to 1835
and Part 1, Vol. II. Knapp	3	1829 to 1836	Mylne and Craig	5	1836 to 1840
Moore	15	1836 to 1862	Craig and Phillips	1	1841
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Moore (The Gorham Case)	1	1850	Hall and Twells	2	1848 to 1850
Moore (East India Appeals) Law Reports (Indian Ap- peals)	14	1836 to 1871	Macnaghten and Gordon	3	1849 to 1851
	23	1873 to 1895	De Gex, Macnaghten, and Gordon	8	1851 to 1857
			De Gex and Jones	4	1857 to 1860
			De Gex, Fisher, and Jones	4	1860 to 1862
			De Gex, Jones, and Smith	4	1862 to 1866
CHANCERY.			Romilly's Notes of Cases	1	1767 to 1787
Acta Cancellariæ	1	1545 to 1625	Wilson, 4 Parts	1	1818 to 1819
Cary	1	1557 to 1604	Cooper, temp. Brougham	1	1833 to 1834
Choyce Cases in Chancery	1	1557 to 1606	Donnelly	1	1836 to 1837
Tothill	1	1559 to 1646	Cooper's Practice Cases	1	1837 to 1838
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Reports in Chancery	1	1615 to 1712	Hall and Twells	2	1848 to 1850
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Drewry and Smale	2	1860 to 1865	Keble	3	1861 to 1879
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			Salkeld	3	1889 to 1712
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			Fortescue	1	1895 to 1738
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			Ridgeway, temp. Hardwicke	1	1733 to 1737
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			Lee, temp. Hardwicke	1	1738 to 1738
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			Lofft	1	1772 to 1774
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			East	16	1801 to 1812
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			— Adolphus	5	1830 to 1834
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			Perry and Davison	4	1838 to 1841
			Gale and Davison	3	1841 to 1843
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State Trials, with Index	34	1163 to 1820			
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Brooke's New Cases	1	1515 to 1558			
March's transl. of Brooke }					
Benloe	1	1531 to 1628			
Leonard	1	1540 to 1615			
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Arnold and Hodges' Practice Cases		1840 to 1841			
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Saunders and Cole		1846 to 1848	Anstruther		1792 to 1797
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{ Wollaston		1840 to 1841	Price		1814 to 1824
{ New Practice Cases		1844 to 1848	M'Clelland		1824
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Anderson		1534 to 1605	Crompton and Jervis		1830 to 1832
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Saville		1580 to 1594	Crompton, Meeson, and Roscoe		1834 to 1836
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Winch		1621 to 1625	Hurlstone and Norman		1856 to 1861
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Hetley		1627 to 1632	{ Price's Notes (1 Part)		1830 to 1831
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Lee	2	1752 to 1758	Buck	1	1816 to 1820
Haggard (Consistory)	2	1788 to 1821	Glyn and Jameson	2	1821 to 1828
Phillimore	3	1809 to 1821	Montagu and M'Arthur	1	1826 to 1830
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			Bankruptcy and In- solveny Reports (Dasent)	1	1827 to 1829
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Robinson, C.	6	1799 to 1808	COMMERCIAL COURT.		
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bury and Romilly	1872 to 1875		Military Cases	1	1798 to 1823
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Shaw	2	1821 to 1824			
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Brown's Supplement, containing the unpublished Decisions	5	1622 to 1794	Pitcairn's Criminal Trials	3	1488 to 1624
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Ditto (New Series)	7	1808 to 1825	Maclaurin's Remarkable Cases	1	1670 to 1773
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ENCYCLOPÆDIA



THE LAWS OF ENGLAND

GENERAL INTRODUCTION

"However, the following essay will do thus much good, viz. :—

"First, It will discover that it is not altogether impossible, by much attention and labour, to reduce the laws of England at least into a tolerable method of distribution.

"Secondly, It will give opportunity, both to myself and to others, as there shall occur new thoughts or opportunities, to rectify and to reform what is amiss in this, and to supply what is wanting." . . .

Sir MATTHEW HALE.¹

THE several titles of this Abridgment will set forth, with more or less detail, according to the nature and magnitude of the subject in hand, most, if not all, of the matters commonly recognised among English-speaking lawyers as forming distinct heads in the system of the common law, and being suitable for distinct treatment. In this Introduction it is proposed to attempt a general summary view of what is contained in the whole system; not of what might be expected in an ideal system of law, but of what the laws of England actually deal with. For this purpose the scientific merits of this or that arrangement are of less importance than conformity to general expectation and convenience. And if any one "tolerable method or distribution of the matter of English law" (to use Hale's words) were already sanctioned by authority, or commended by prevailing usage, I should not hesitate to follow it. But in fact no generally received method exists. Only two works purporting to give a general introduction to our law have attained a classical reputation, namely the Commentaries of Blackstone and of Kent; and these differ materially from one another in scope and arrangement, while neither of them covers the whole field. It seems hardly credible at this day, though the fact is easily verified, that in Blackstone's plan contract finds a place only as one of twelve modes in which title to personal chattels can be acquired. Kent is more modern, but large departments of law have either been created or have become vastly more important even since Kent wrote. Stephen's Commentaries include much that Blackstone omitted, but the arrangement is only a little better. Many other schemes have been propounded by later authors, but almost always with a view to the philosophical analysis of law in general;

¹ Preface to *An Analysis of the Civil Part of the Law*.

and few of those authors have thought it needful to abstain from dividing or even scattering abroad in many places topics which English lawyers have long been accustomed to find together. Hence it seems that, if we are to make the attempt at all, we not only may, but must, act in the best way we can on our own responsibility. Scotland is fortunate in having a relatively compendious system, and institutional books which are modern enough to be at least fairly well arranged. Our fortune is yet to seek.

The most general category of law, without question, is Duty. Many legal duties have not any rights obviously corresponding to them, at any rate not any rights of determinate persons. But there are no rights apart from duties. Legal right is nothing else than the power to claim the performance or observance of duty. Without some kind of duty there can be no right, and nothing on which a Court of justice can pass judgment. The laws of every country define and regulate the duties (that is, duties enforceable in courts of justice)¹ of all persons subject to them, and consequently the corresponding rights. When we speak of regulating as well as defining, we imply the existence of rules, or bodies of rules, distinct from those which lay down duties in the abstract. A mere enumeration of duties or rights would not be a working system of law. Such a system, to begin with, presupposes the existence of regular judicial tribunals, established in definite forms, and guided by settled principles beyond and apart from the specific rules governing this or that branch of law.

Coming to matters of less generality, but still highly general, we must know what persons are capable, or fully capable, of duties and rights; for not all human beings can be treated as equally capable (children, for example), even if artificial disabilities are discouraged to the utmost. Then the legal capacity of persons may be extended, as in agency and the formation of corporations. The general consequences which flow from the very nature of an artificial person, as distinct from the rules governing the constitution and powers of trading companies or other particular kinds of corporations, have to be considered here.

We may put on the same line with these fundamental notions a few of the most general rules and maxims, for example, the rule of responsibility for the acts of servants, and the maxim that everyone is assumed to know the law. Then there are principles running through all or most parts of the law, though nowhere dealt with by authority as a whole, as to the extent to which the law takes account of a man's intention, motives, or disposition, of his knowledge or ignorance of facts, and of his success or failure in using due diligence. Whether these and the like matters, or some of them, would more conveniently be placed first or last in a complete exposition, is a question admitting of plausible reasons on either side; where to draw the line between the statement, with necessary illustration, of such principles and their application in special departments, appears to be a matter of literary judgment rather than of legal doctrine.

Again, we need auxiliary rules whereby we may know how rights and duties are created, acquired, transferred, and brought to an end. In a system so elaborate as our own, it is found that rules of this kind (such as the law of executors, or of vendors and purchasers) are not inferior in either bulk or importance to the primary rules whose application is guided by them. And they are dealt with, according to their importance, either separately or as accessory to particular branches of substantive law; not

¹ Space does not allow us to consider the relation of positive law to moral rules; nor would it be useful for the purpose in hand.

unfrequently, for reasons of convenience, in both ways. Practical workers want to find things grouped not only, nor chiefly, in a logical order, but more or less nearly as they occur in practice; nor will any real or supposed propriety of logical division reconcile them to being constantly sent from one book to another. Law does not consist of a number of self-contained and mutually exclusive propositions which can be arranged in a rigid framework.

A highly important auxiliary branch of law is that of construction. The rights and duties of individuals are largely dependent on the express declarations of the legislature, which are binding of their own force; of public officers and bodies authorised by the legislature to make binding rules of particular kinds; and last, by no means least, of private persons who can, within the limits set by the general law, make their own agreements and disposing acts a law for themselves, or those who have to claim through them. The question in what sense a conveyance, or a will, or a contract, is binding, occurs much oftener in practice than the question whether it is binding at all. In the case of an Act of Parliament, since its validity cannot be disputed in the High Court of Parliament itself or in any other Court of justice, this is the only kind of question that can be raised. Some rules of construction are of very wide application, not counting the rules of grammar and common sense which have to be applied to the understanding of all human discourse. But special kinds of problems are presented by every distinct kind of operative document, and these are much more likely to cause real difficulty. Hence we find the construction of statutes, deeds, wills, mercantile instruments of the well-known kinds, and so forth, treated for the most part separately.

Closely connected with rules of construction, but of wider application, are the rules as to reckoning of time, distance, money, and the like. These, again, are commonly dealt with in English-speaking countries in a dispersed manner, as they occur in this and that particular branch of law. Whatever the conveniences of this usage may be, it certainly has the inconvenience of tending to produce a number of slightly different rules where one rule would have served as well.

When all these things have been accounted for, we are still only at the threshold of a working system of law. Legal duties may be ascertained, but even when they are too certain for discussion, they are not always fulfilled. There must be ways and means for the enforcement of duties and the satisfaction of just claims; in other words, law deals with remedies as well as rights. What form of redress is attainable is in many cases a far more practical question than whether any right has been violated. Many rules which appear hard at first sight are mitigated by the discretionary powers of judges to reduce punishment, and of juries to reduce their awards of damages, to slight or merely nominal amounts. On the other hand, many claims recognised as just are apt to bear but slender fruit of satisfaction to the parties entitled, by reason of the difficulties of various kinds that stand in the way of working out a complete remedy.¹ We do not speak here of difficulties of fact altogether external to the law, such as the insolvency of a debtor. The law can compel a fair division among creditors of what there is to divide; it cannot make assets where there are none, or more assets than there are.

¹ People seem to think it scandalous whenever the law fails to do perfect justice; yet they constantly renounce the attempt in their own affairs, as when a travelling party makes a rough division of expenses rather than be at the pains of stating an exact account.

Then remedies are of divers kinds. The consequences of wrong-doing, default, or error (for many breaches of legal duty proceed not from wilful refusal to do right, nor even from negligence, but from honest errors of judgment), are different according as it is a case for punishment, or for redress to the person injured, or peradventure for both. Where there is private redress, again, the consequences differ according as it takes the form of restitution or performance in kind, or of compensation in money. Where the original claim is merely for the payment of money, this last difference almost vanishes.¹

The law of duties, rights, and remedies, together with the needful auxiliary rules, is often called substantive law by modern writers. When we have gone thus far, we are still a long way from having considered the whole of law. For it is not enough to know what is legal justice; we must know how to get justice done by the proper Court. The rules which fix the manner and form of administering justice are called rules of Procedure, or not unfrequently, by modern systematic writers, Adjective Law. Procedure—with which “practice” is sometimes synonymous—“denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the Court is to administer—the machinery as distinguished from its product.”² In modern law, procedure tends more and more to become uniform; in many countries, including British India, civil and criminal procedure are embodied in special codes; and here the Rules of the Supreme Court are a code of civil procedure in everything but name. Where this stage has been attained, procedure is obviously best dealt with as a whole, and apart from the substantive law. But where many special forms of procedure exist, or formerly existed, in different Courts and different kinds of proceedings, they naturally have or had to be considered as attached to the particular subject-matter; and in an earlier stage what now seems to us the natural order was reversed, and the matter was rather annexed to the form than the form to the matter. “So great is the ascendancy of the law of actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.”³ This may be seen in any of our old books on pleading and practice, and in some that are not very old.

The law of evidence is, both in logic and in history, a branch of the law of procedure; but, for historical reasons, of which no statement can be attempted here,⁴ it has taken an independent position in the common law, and, as treated by text-writers and indexers, has made large annexations not only from the rules of procedure and pleading, but from the various branches of substantive law. What should be properly called the law of evidence, however, is the body of rules “which, with a view to ascertain individual rights and liabilities in particular cases, decides:

“1. What facts may, and what may not be proved in such cases;

¹ Not quite: the distinction between a money debt itself and damages for non-payment of the debt was significant in the old forms of action.

² Lush, L. J., in *Poyser v. Minors*, 1881, 7 Q. B. D. 333. “Practice” is usually confined to the minor details within a given form of procedure. How a jury shall be made up is matter of practice; whether there shall be a jury at all is hardly so in the common speech of lawyers.

³ Maine, *Early Law and Custom*, p. 389.

⁴ They will be fully explained in a work now in progress by Professor Thayer of Harvard University. The section on trial by jury has already been issued in advance.

"2. What sort of evidence may be given of a fact which may be proved ;

"3. By whom and in what manner the evidence must be produced by which any fact is to be proved."¹

That is to say, the main heads are relevance of facts, proof, and burden of proof.² As facts which may not be proved at all, and facts not proved in the manner which the law requires, are alike non-existent for judicial purposes, it is obvious that the substantive rights of parties may be materially affected according as the rules of evidence are narrower or wider. For example, the old rule of the common law Courts,³ that parties could not bear witness in their own causes, must have made a large number of otherwise just claims of none effect. Hence there is considerable difficulty in drawing an exact line between rules of evidence, procedure, and law. The usual and all but inevitable solution of text-writers has been to repeat every rule that lies anywhere near the borders in every place where the mention of it might be convenient, or the want of mention misleading. Many rules of evidence, however, are of so limited an application, that they are of no use or importance apart from their special subject-matter ; and when we speak of the law of evidence in general we do not consider rules of this kind.⁴

We may now contemplate in a summary way the divisions of the substantive law, bearing in mind that they are divisions of legal rules, not of the facts and affairs to which the rules apply. The same facts may call for the application of several rules belonging to distinct branches. Neither must we forget that every department has need, some more and some less, but all in a greater or less degree, of the auxiliary bodies of rules above mentioned.

An ancient and useful division neglected by Hale and Blackstone, but maintained by almost all moderns who have considered the question, is that of public and private law. While it is true that all laws exist for the sake of the common weal, and all legal duties must be duties of some person, yet some rules and heads of law seem to have regard in the first place to the safety or welfare of society as a whole, and others to be concerned with the rights of individual citizens.⁵ The former are called public and the latter private law. Not that public law does not concern individual citizens, or that the rules of private law have no public interest ; but that the public factor in the one case, and the private in the other, is more conspicuous. It will be found, moreover, that the division answers more nearly than most doctrinal classifications to the actual course of practice. Working lawyers, it is true, do not in common practice talk of either public or private law. The reason is quite simple ; they are concerned

¹ Stephen, *Digest of the Law of Evidence*, 4th ed., 1893, p. xij.

² "Admissibility of evidence" is an ambiguous term covering both (1) and (2).

³ The rules of equity pleading and evidence were different, being founded on the civilian view that the Court took an active part in ascertaining the facts.

⁴ See *op. cit.*, pp. xvi, xvii.

⁵ "Publicum ius est quod ad statum rei Romanæ spectat, privatum quod ad singulorum utilitatem," D. I. 1, *de iust. et iure*, i. § 2. I do not think this definition of Ulpian's has ever been improved upon. The test of the State being a party does not seem quite right, though it has respectable authority. For the State (using its own corporate name, or the name of the sovereign, or a public department, or a special body of trustees or commissioners, as the case may be) is an owner, buyer, and seller, and in many countries (including some of our own colonies) an undertaker of traffic by land and water and other commercial enterprises ; and these are in their nature transactions of private law, and are judged in the main by its ordinary rules, even though the State and its officers be in some respects privileged.

with much less vast and general heads. But they do maintain, for example, a clear distinction between criminal law and the law of property, notwithstanding that, in particular criminal cases of offences against property, the Court may have to consider and decide questions of property, while, on the other hand, it may be necessary for a Court of civil jurisdiction, before it can settle a question of title to property, to decide whether a criminal offence has been committed. Again, the rules which fix the right to vote at parliamentary and municipal elections are easily seen to be in a different category from those which secure the rights of individual citizens in their daily life.

It would be a task of unprofitable conjecture to account for the perplexed and perverse arrangement adopted by Hale, and in the main followed by Blackstone, with the result of putting the legal literature of England in a distinctly inferior position to that of Scotland as regards the means of anything like a systematic and compendious view. There may have been, with Hale at any rate, some feeling of a supposed necessity to place the rights and prerogatives of the Crown as near the beginning as possible; and superficial acquaintance with the methods of Justinian's *Institutes* and the modern civilians would seem to be answerable for the "Rights of Persons" and "Rights of Things" which led both Hale and Blackstone into disastrous confusion. With Blackstone the working out of a radically bad plan was, happily, much ameliorated in detail by the author's admirable literary skill and practical experience of affairs.

PUBLIC LAW.

Public law may be roughly distributed under the following heads:—

I. *Constitutional*, containing so much of the political constitution as is laid down in positive legal rules. This includes the formation, powers, and privileges of Parliament; the executive functions and powers of the Crown; the existence and composition of the judicial establishment; the legal position of the clergy, the navy and army, and the various departments of the public service in relation to the Crown and Parliament; and the machinery of local government.

II. *Regulative*, embracing the mass of modern legislation (for there is little to be said of common law rules here, and the statutes are mostly recent), intended to safeguard the public welfare and interest partly by the direct action of the State, partly by controlling the conduct of bodies and persons in matters lawful in themselves, but having incidents and results that may lead to public inconvenience. In this kind we have Acts relating to relief of the poor, education, the government of particular professions, such as the legal and medical; also those which deal with merchant shipping, railways, factories, public health, building, and so forth. Many matters of this class are dealt with by Orders in Council, or local by-laws made under authority conferred by some Act of Parliament. This is still legislation, though delegated legislation. Few indeed are the members of the commonwealth, from the great shipping and railway companies down to the smallest householder, who are not more or less affected by some of these provisions.

III. *Penal or Criminal*.—It would be idle to dwell here on the internal classification of criminal law. • Certain broad divisions are so obvious that

no material variation of them seems practicable. In the Criminal Code Bill of 1879 the main heads were as follows:—

TITLE I.—Introductory provisions (this included the general grounds of justification and excuse).

TITLE II.—Offences against public order, internal and external (such as treason, riot, piracy).

TITLE III.—Offences affecting the administration of justice and the maintenance of public order (corruption and neglect of officers of justice, perjury, escape of prisoners).

TITLE IV.—Offences against religion, morals, and public convenience (including nuisances).

TITLE V.—Offences against the person and reputation.

TITLE VI.—Offences against rights of property or rights arising out of contracts.

TITLE VII.—Procedure.

The order in which these topics are dealt with is not substantially different from the rather more elaborate arrangement of the Italian Code which has been in force since 1st Jan. 1890, and which is probably the most complete and scientific of modern penal codes. There is respectable authority, on the other hand, for placing offences against the State and public order after, and not before, offences against private persons and property. Mr. Justice Wright preferred that order in the draft code prepared by him for Jamaica in 1875, and recently adopted¹ in substance in St. Lucia and some other colonies. Most people, I think, would naturally turn to the beginning rather than the end of either a code or a text-book for the class of crimes which primarily affect the State. But it is really a matter of indexing one way or the other.

Besides the main body of criminal law and procedure, we have the regulation of punishment and penal discipline, which now depends, with few exceptions, if any, on modern statutes. These matters, being of an executive and not a judicial nature, stand apart from the rules in which judges and lawyers are usually versed, but without them the law would be inoperative or its operation would be capricious.

PRIVATE LAW.

Many arrangements of the rules of private law have been proposed. We shall take as our guide the generality of the duties involved and the extent and permanence of the corresponding rights. By beginning at the general and constant duties of citizens to one another, and proceeding to those which are less so, and thence to those which are assumed only by voluntary acts, we shall obtain a fairly intelligible order without breaking up the familiar working titles of the law.²

The most general and absolute duties which we owe to one another are those which have regard to safety and freedom of the person, to security in family life, to honour and reputation, to freedom in one's livelihood and exercise of lawful business, to protection from wilful fraud, and to the enjoyment free from intrusion of whatever one is peaceably holding and using, or is

¹ See the *Journal of the Society of Comparative Legislation*, vol. i. pp. 177, 180.

² For the leading ideas of this arrangement I owe much to a series of articles published many years ago by Mr. Justice O. W. Holmes in the *American Law Review*, the matter of which was only in part embodied in his work on the Common Law.

entitled to use. Such duties and rights are common to all men. Moreover, they extend in many kinds of affairs much beyond the disallowance of wilful molestation or other unlawful interference. Every one is bound to use the caution of a reasonably prudent man in the conduct of his own affairs, and to that extent to avoid putting his fellow-citizens in danger of harm to their persons or property. We are not here attempting to state the rules of law, but only the broadest principles which underlie them. The rules cannot be accurately stated in few words; there are exemptions in some directions, conferring qualified or unqualified immunities, and exceptionally strict rules in others.¹ The sum of these highly general duties, with all their developments and modifications, makes up the law of civil wrongs or torts. Most of them are pretty well understood; but the exact amount and kind of interference with another man's means of livelihood, by acts not otherwise distinctly wrongful, which will entitle him to legal redress, is extremely difficult to settle. This matter is still under the judicial consideration of the House of Lords at the time of writing these lines.

There is some trouble in drawing the line between the law of trespass and other wrongful interferences with rights of possession and property on the one hand, and the law of property itself on the other hand. In principle we have questions like these, Do such and such acts amount to trespass? When may an officer of the law break open doors? Is a licence in such and such terms, or an order from one's master in such and such a course of business, a justification or excuse for entering or remaining on land, or dealing with goods? And such questions are obviously distinct from the question to whom the land or goods belonged. They assume, not that any man is bound to know exactly what is his neighbour's, or which of his neighbours is the owner, but that he is bound to know what is not his own or subject to any right of his. But in fact the two kinds of dispute can often not be separated, and the historical and technical peculiarities of our law have likewise contributed to create a more or less debateable borderland. Text-writers on the law of property have so much else to do that they have generally confined themselves, as far as possible, to what is clearly on their own side of the border.

In the present arrangement the law of torts stands next the criminal law, and, in fact, they have much common ground. Many wrongful acts are both criminally punishable and the subject of civil remedies. On the other hand, the law of torts, as will shortly be seen, is rather widely separated from the law of contracts. This is contrary to the Roman and Continental usage, which groups them together under the category of Obligations; that usage is to be respected on its own ground, but, I cannot see that it has any particular convenience for the purposes of the Common Law. Not much can be found, I think, that is common to our law of torts and of contracts, and not common to other branches as well. Certain rules relating to the measure of damages, and a limited part of the rules as to negligence, are the only ones of importance, excluding such as really belong to procedure, that I can think of as answering this description. The Continental method is correct from its own point of view, but it tends to obscure the practical importance of the distinction between rules of conduct imposed on parties by the law without regard to their intentions, and rules which the declared will of the parties has made the law for their case.

¹ We get some curious contrasts. Honest and even reasonable belief is of itself no excuse for defamation; but in matters of business there is no general duty to use any degree of prudence at all in making assertions intended for other people to act upon.

Broadly speaking, the law of torts deals with the former class of rules, the law of contracts with the latter.

The next class of civil duties and rights, in the descending order of generality, seems to consist of those concerned with possession and property. Within this class rights are more conveniently put in the front than duties. In fact the law of property, in the special sense, is to a great extent the law of title; it is concerned mainly with the relative rights of owners, unlimited or limited, incumbrancers, and so forth, in or over a given subject-matter, and with showing how they are constituted. The duty of mere strangers to respect ownership in all its forms is taken for granted. Under this head we deal with possession and the rights arising from it; with the tenure of real estate and interest in chattels real; and with interests, absolute and qualified, in personal property. It is admitted, I think, by most recent workers in this field, that in the Common Law the idea of possession is distinctly prior to that of ownership, and even at this day is the more important of the two; but for the present purpose this matters little. Our classification of "real" and "personal" property is peculiar. As it stands, it coincides only in part with the division into "moveable" and "immoveable" which is recognised in the law of nations and by the municipal laws of all or nearly all countries, including British India, in which the Common Law does not prevail. Originally founded on the same natural difference of things, it has become, through a series of historical accidents, not merely artificial but arbitrary. A summary view of the English law of property as a whole is therefore hardly possible.¹

It is impossible to handle the law of property without taking account of equitable estates and interests; and so far as necessary for that purpose the law of trusts must be anticipated, or rather the historical introduction to the law of trusts must have its place here. But this does not involve considering at large the duties and liabilities of trustees and the administration of trusts. Those topics form a separate and extensive branch of English law.

The forms of dealing with property by deeds or other instruments *inter vivos* and by will, together with the rules of construction applicable to deeds and wills and other incidental matters, in short all that we sum up in the word Conveyancing, cannot be divided in practice from the law of property itself. It is difficult to be a good real property lawyer without a conveyancer's training, and impossible to be a good conveyancer without being a good real property lawyer. Intestate succession might be placed elsewhere in a strictly scientific arrangement. But, since in our modern law it has shrunk to almost rudimentary dimensions as compared with the large place it once filled, and in many countries continues to fill, it may well enough pass, according to the common usage of lawyers and text-writers, for an appendix to the law of property and conveyancing.

Under the same great head of Property we have an important branch of the law dealing with rights over land and goods belonging to others, and this is subdivided into the law of mortgage, pledge, and lien, and the law of easements and profits. These last coincide approximately with the *servitudes* of Roman law; but rights of common and other similar rights, as they occur in the Common Law, have many features and incidents which, though analogies may be found to them in the customs of

¹ The Appendix to Part I. of Mr. Kenelm Digby's *History of the Law of Real Property, on the Place of the Law of Real Property in the English System*, 4th ed., 1892, p. 297, and the tables therein given, may be usefully consulted.

widely remote countries, would be difficult to parallel in any other regular system of jurisprudence. The still living recognition of local custom as a source of rights is perhaps the most interesting of these.

Then there are exclusive private rights not relating to any defined material thing, but still in the nature of property. Such are what we call franchises: the exclusive right to maintain a ferry for profit at a particular spot is the classical example. To these a number of monopolies, limited and guarded in various ways, have been added in modern times for the encouragement of literature and art, invention and industry. Such are patent rights, copyright in its various branches, and the right to trade marks.¹ All these, though they do not involve ownership of any material object, may be called statutory property.

We now pass from duties wholly created by the rules of law to those which depend on relations created by acts of the parties, and may be defined to a greater or less extent, according to the nature of the case, by the will of the parties themselves. In this category the most important place is taken by the law of contract with its many subdivisions, among which are the far-reaching modern developments of the law merchant. It would be out of place to enumerate them here. Common to them all is the cardinal principle of regard to the intention of the parties. That is always the first thing to ascertain. Auxiliary and restrictive rules are required, and are present in abundance, but their function is secondary. Many rules formerly supposed to be absolute have been reduced by the course of modern decisions to canons of construction, guides at need but not masters. The law of partnership and companies, it may be observed, is as much a branch of the law of contract as any part of mercantile law, though in the history of English justice it has fallen to the province of Courts of equity, and company law has now, for about a generation, become for all practical purposes a matter of intricate statutory regulation, in which the principles of partnership law have sunk out of sight. We have come, indeed, to the singular result that a trading company may, it seems, be formed without any substantial contract or association whatever.² The law of bankruptcy, though its effects are not now confined to traders, is in substance a special branch of remedial law and procedure annexed to the law merchant.

In sundry cases of "relations resembling contract" (as the Indian Contract Act calls them), obligations like those of contract are attached by law to situations where otherwise one party would make an unjust profit by another's loss, that loss having been brought about by mistake of fact, compulsion of law, or, sometimes, emergency for the protection of a common interest. The duties of compensation or restitution which arise on such occasions were recognised in our law comparatively late, and only by means of pleading a fictitious promise. Hence the recognition of "contracts implied in law," or "quasi-contracts" as we have now begun to say, as forming a distinct and substantive head of the law, has

¹ The right to restrain publication of unpublished matter is affirmed by the common law quite independently of copyright legislation. It is in part a right of property; in part, it would seem, a "primitive" right not yet exactly defined, but analogous to the right not to be molested in one's business. Neither property nor contract will fully account for it. Trade marks were in like manner formerly protected, to a certain extent, under the head of restraining fraud; and trade names, apart from trade mark, are so still. "Unfair competition" has become a recognised catchword in America, though not in England, for cases of this class.

² *Salomon v. Salomon & Co. (H. L.)*, 16th November 1896.

come even later. It is unfortunate that there is no authority for speaking of "constructive contracts," which would exhibit the analogy to other useful fictions in the law.

A few topics not commonly dealt with in this connection, as they belong to other special subjects and in part to special jurisdictions, appear to be of the same kind in principle. Such are the rules as to salvage, as to certain obligations of partners and tenants in common, and as to the duty towards the true owner incurred by the finder of a lost chattel who takes possession of it.

Trusts form an important head of our law which has many elements in common with the law of contract, but stands on an independent footing. The essence of trust is the acceptance of property to be held and administered for the benefit of the person from whom it is received, or of third persons, or both. A trustee's obligation is in the first instance personal, but the refinements of modern equity go far beyond the analogies of contract in the search for some one to be held liable. Moreover, rights created under trusts, though not binding as against third persons absolutely, are binding on third persons who have notice of the trust, and to that extent have the nature of property. Beneficial interests under the trusts of marriage settlements and wills do form, as is matter of common knowledge, a large proportion of the property and sources of income of very many persons. A peculiar feature of our law and practice under this head is the amount of administrative work undertaken by the Court, especially where the interests of infants are concerned. Much of this is quite different in kind from ordinary litigation, and cannot be judged by the same standards or reduced to the same methods.

The law of trusts, like that of contracts, has been artificially extended, for the sake of justice and convenience, to various cases where no trust has been actually created, but a legal estate or interest has been acquired in circumstances which make it inequitable for the holder to deal with the property as beneficial owner. This kind of "obligation in the nature of a trust"¹ is exactly analogous to a "quasi-contract." "Constructive contract" and "constructive trust" would be perhaps the most proper terms to mark the analogy; the latter of them is current, but the former, as above observed, has never been used at all.

There remain the domestic duties arising out of family relations, that is to say, the law of husband and wife, parent and child, and guardian and ward; this last head being no longer prominent, except sometimes in disputes between parents as to the custody or education of children, but still not obsolete. These duties depend on acts of parties, but they are strictly personal, and are not, like duties assumed by contract, variable at will, although the right to enforce them may be lost, in certain circumstances, by misconduct or neglect. We do not count here the general disabilities or immunities of married women and infants in their dealings with the world at large, as they seem to belong in part to the preliminary notions of the law, in part to those divisions of the law of contract and property whose rules may be affected in their application by the incapacities in question.

The relation of master and servant was formerly analogous to the family relations, but in modern usage it is dealt with, both in law and in fact, as founded on contract. A few traces of the older doctrine remain in customary incidents of the contract which prevail only in the absence of any different agreement, and in rules which are now seldom used, and then

¹ Indian Trusts Act, s. 60.

not for their original purpose. The action for loss of service is perhaps the most remarkable of these survivals. A contracting party's right to bring an action against a third person for "maliciously" inducing the other party to break the contract is historically connected with the old action for enticing away a servant, but it is now maintained on other grounds, and the act of a wrongdoer in this kind must be classed among the miscellaneous violations of the general duty not to molest one's fellow-subjects in their lawful business.

Common-law jurisdiction had no means of dealing with the domestic relations as between the parties themselves. The remedies now administered by our Courts, and considerably extended in the case of divorce by modern legislation, are derived partly from the earlier jurisdiction of the ecclesiastical Courts and partly from the quasi-paternal jurisdiction exercised on behalf of the King, in an executive rather than a judicial capacity, by the Chancellor.

The rules of intestate succession may be logically regarded as an auxiliary department of this branch of law, but it is in fact more convenient, and in this country it is the universal practice, to annex them to the law of property, as we have said above. As in our modern law there are no limits set, as in other systems, to a man's power to dispose of his estate and effects away from his wife, children, or kinsfolk, either in his lifetime or by will, intestate succession may be said to take place only by accident or neglect, and in England it has long been of quite subordinate importance. It now occurs, and gives trouble, mostly in the case of small estates.

We have thus taken a rough view, but still some kind of view, of the variety of topics that may engage English Courts of justice. Outside all these divisions, however, but capable of becoming material within any of them, is the class of questions arising from the fact that there are many civilised jurisdictions and many legal systems in the world, and rights acquired under one jurisdiction may have to be ascertained and enforced under another. A Court often has to consider whether it should assume jurisdiction at all, and also, where its jurisdiction is confirmed or not disputed, whether it should not, in exceptional circumstances, determine the legal consequences of the facts in the case according to the rules of some other system than that which the Court habitually administers. It may be disputable both what Court is the proper one to do justice, by reason of competency or practical power of executing judgment, and what law is the proper measure of justice for the parties, by reason of their express or implied agreement to be bound by one law rather than any other, or otherwise. Questions of this kind, with all the complications incident to them, are collected under the title of "Conflict of Laws" or (inelegantly, but commonly) "Private International Law." The nature and origin of the rules applied in this region have been much discussed; but it is certain that at this day a considerable number of such rules are as much part of the law of England as those of the law merchant, which also were once of a cosmopolitan character, and were regarded as not owing their force to any municipal legislation or jurisdiction. For fuller consideration of these matters the reader must be referred to the works of specialists.¹

It may perhaps be useful to recapitulate in a summary form the divisions we have broadly marked out:

¹ The latest and most complete English work is Mr. A. V. Dicey's *Digest of the Law of England with reference to the Conflict of Laws*, London, and Boston (U.S.A.), 1896.

A. GENERAL AND PRELIMINARY.

Persons and their capacity.

Extensions and limitations of capacity. Agency. Corporations.

Responsibility in general.

• Intention and motives. Malice in law.

Liability for consequences.

Liability for acts of agents and servants.

Ignorance and mistake.

Negligence.

Acquisition and transfer of rights in general.

Rules of interpretation (so far as generally applicable).

Remedies.

B. PROCEDURE. EVIDENCE.

C. SUBSTANTIVE LAW: and herein—

I. Public Law.

Constitutional (including the judicial system).

Regulative and administrative.

Criminal.

II. Private Law.

/ Civil wrongs.

Property, conveyance, and succession to property.

Contract. Mercantile law. Companies. Bankruptcy.

Trusts.

Family relations.

III. Conflict of Laws.

The foregoing arrangement is not put forward as representing necessarily, or in fact, the most convenient order of studying the law. Few lawyers will doubt that a student should have an elementary knowledge of the constitution of his country and the outlines of public law in general before grappling more closely with legal problems of any kind, or that the subject of "Conflict of Laws" should, so far as possible, be postponed till a fair knowledge of the ordinary application of English law to English causes of action has been acquired. But also not many will think it necessary that the details of local government or the minuter difficulties of criminal law should be studied at an early stage. It is really impossible to arrange a course of law studies in linear progression. Gradual acquaintance must be made with two or three aspects of the law simultaneously. Principles cannot be learnt to much good purpose without an eye on procedure, and the different branches of our jurisprudence so constantly illustrate one another that it is a positive advantage to the student to have more than one constantly before him.

Again, the best order for a code or consolidating statute would seem to be that which makes it most useful to the practitioners who have to deal most with it, not necessarily that which would make it easiest to follow to a person ignorant of the subject. But codes may, and in some cases have been, as in India, valuable instruments of political and even moral education to the general public, and in such cases it is proper for the legislator to consider their extrajudicial uses. It may be wise now and again to declare, with the deliberate authority of the State, things which are superfluous for the lawyer but profitable for the citizen.

F. POLLOCK.

"A."—"A," as it occurs in the phrase "with a view" of giving a creditor a preference in sec. 48 of the Bankruptcy Act, 1883, 46 & 47 Vict. s. 48, has been considered in *In re Daly*, 1886, 19 L. R. Ir. 83; *Ex parte Taylor*, 1886, 18 Q. B. D. 295; *Ex parte Hill, re Bird*, 1883, 23 Ch. D. 695. As to other meanings of the term "A," see Stroud, *Jud. Dict.*

"A" List.—See COMPANY.

Abandonment of Action.—A plaintiff who is satisfied that he cannot succeed in his action (see ACTIONS IN HIGH COURT as to course of) may at any time consent to judgment against himself, and pay the defendant his costs. And after such a judgment he can never take any subsequent proceeding for the same cause of action. As to what is meant by "the same cause of action," see *Wadsworth v. Bentley*, 1853, 23 L. J. Q. B. 3; *Darley Main Colliery Co. v. Mitchell*, 1886, 11 App. Cas. 127, and *MacDougall v. Knight*, 1890, 25 Q. B. D. 1.

But it may sometimes be the case that, though a plaintiff is compelled—through lack of some necessary piece of evidence or for other adequate reasons—to abandon his present proceedings, he may yet desire to preserve his right to bring a fresh action under more favourable circumstances. At common law, before the Judicature Act, a plaintiff was allowed to discontinue his action at any time before judgment, or to withdraw the record before the jury were sworn, or to elect to be non-suited (see NON-SUIT), and was yet at liberty to re-enter the cause, or bring a second action. So, in Chancery, a plaintiff could (prior to Consolidated Order 23, r. 13) dismiss his own bill (see BILL IN CHANCERY), and subsequently file another; for only a dismissal on the merits could be pleaded in bar to another suit for the same matter. But now in all Divisions of the High Court this liberty has been greatly curtailed; there is no longer such a thing as a non-suit; and the plaintiff's right to discontinue his action is regulated by Order 26, r. 1. Up to the delivery of a reply the plaintiff may discontinue without leave, and yet bring a second action; he must, however, pay the costs of the first action, or the second action will be stayed (Order 26, r. 4). But once the plaintiff has delivered a reply, he can only discontinue by leave, and the Master can, and generally will, make it a condition of giving such leave that no further proceedings shall be taken in the matter.

Abandonment of Cargo ; Claim ; Ship.—See CARGO and MARINE INSURANCE.

Abandonment of Domicile.—See DOMICILE.

Abandonment of Possession.—See POSSESSION.

Abandonment of Residence.—See DOMICILE.

Abandonment of Security.—See SECURITY.

Abandonment of Trade Mark.—See TRADE MARK.

Abated.—See ABATEMENT.

Abatement.—1. *Of Civil Proceedings.*—A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*; and whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment; but judgment may in such case be entered, notwithstanding the death (R. S. C., Order 17, r. 1). See ACTIO PERSONALIS.

This rule applies only to a case where the cause of action “survives or continues” in some person who is before the Court (*per* Fry, J., in *Eldridge v. Burgess*, 1878, 7 Ch. D. 411). After issue had been joined and notice of trial given, by the sole plaintiff in an action, he filed a liquidation petition, under which a trustee of his property was appointed. When the action came on for trial, no one appeared for the plaintiff or for the trustee; and as there was no evidence that any notice of the action had been served on the trustee, the action was struck out of the list.

Where any cause or matter shall have been standing for one year in the cause-book marked as “abated,” or standing over generally, such cause or matter, at the expiration of the year, shall be struck out of the cause-book (R. S. C., Order 17, r. 10). Where a cause has been struck out under this rule, a fresh notice of trial must be given before it can be re-entered (*Le Blond v. Curtis*, 1885, 33 W. R. 561).

2. *Of Criminal Proceedings*—means their termination without any decision on the merits and without the assent of the prosecutor.

(a) Criminal proceedings, whether summary or for indictable offences, do not abate on the death of the prosecutor, being in theory instituted by the Crown (*R. v. Truelove*, 1880, 5 Q. B. D. 336). Nor do they now abate on the demise of the Crown (4 Will. & Mary, c. 18, s. 6; 1 Anne, c. 2, s. 8). (See CROWN.) Nor is a warrant or summons avoided by the death of the judge or justice who issued it (see 42 & 43 Vict. c. 49, s. 37).

(b) It was at one time a common practice to put in a plea in abatement to an indictment; the plea must be pleaded before the general issue (*q.v.*), and without admitting or denying the offence charged, it set up some matter of fact which, if proved, had the legal effect of defeating the indictment as then framed. It was therefore merely dilatory, and must be pleaded with strict and precise exactness (*O’Connell v. R.*, 1843, 5 St. Tri. N. S. 1, 787), and must be verified by affidavit (4 & 5 Anne, c. 16, s. 11), and amendment was not allowed (*R. v. Cooke*, 1824, 2 Barn. & Cress. 871). Ultimately, on the abolition of appeals, it was confined to objections as to misnomer and want of addition, or improper addition, and it has fallen into disuse since 7 Geo. IV. c. 64, s. 19, which requires the Court to amend according to the truth, when such a plea is pleaded and proved, and 14 & 15 Vict. c. 100, s. 1, which renders description of the defendant unnecessary. [Hereon see Pollock and Maitland, ii. *Hist. Eng. Law*, 612; Hawk., P.C., bk. ii. c. 13, ss. 96–108;

c. 26, s. 150; c. 31, s. 7; c. 34; Bullen & Leake, P. P., 3rd ed., 468, *R. v. Gibson*, 1806, 8 East, 107. See also AMENDMENT IN CRIMINAL PROCEEDINGS.]

(c) The Court could also abate the proceedings, either *ex officio* or upon demurrer (*q.v.*) or motion to quash, for many formal defects (*Hawk*, P. C., bk. ii. c. 23, s. 96); but most of these are now made immaterial by 14 & 15 Vict. c. 100, s. 24; and by s. 25 they must be challenged before the jury is sworn (see JURY), by demurrer or motion to quash, and may be amended by the Court. See VARIANCES.

Abatement (In Heraldry).—A badge in coat-armour indicating dishonour of some kind.

Abatement of Annuities.—An annuitant is subject to the same rule of abatement as a general legatee (see ABATEMENT OF LEGACIES, *infra*) if the annuity is charged upon the personal estate (*Innes v. Mitchell*, 1846, 1 Ph. Ch. 6, 716; *Miller v. Huddleston*, 1851, 3 Mac. & G. 513). Accordingly, where there is a deficiency of assets, there is no priority as between annuitants and legatees, and both must abate proportionately. The rule is the same whether the annuity is to commence immediately on the death of the testator, or at a future time (*Innes v. Mitchell*, *supra*). Annuities abate between themselves as well as with reference to other legacies (*s.c.*).

To calculate the value of annuities for purposes of abatement, their value is to be taken at the time when the estimate is made. The value of the annuity of a dead annuitant is the sum of the payments which would have been made to him in respect of it; and the value of a reversionary annuity which has come into possession, is its present value according to the Government tables at the time of abatement plus any arrears due upon it (*Todd v. Bielby*, 1859, 27 Beav. 353; *Potts v. Smith*, 1869, L. R. 8 Eq. 683; *Delves v. Newington*, 1885, 52 L. T. 512). The rule is the same where all the annuitants are alive (*Heath v. Nugent*, 1860, 29 Beav. 226; *In re Wilkins*, *Wilkins v. Rotherham*, 1884, 27 Ch. D. 703). Where the testator's estate is being administered by the Court (see *In re Nicholson's Estate*, 1875, L. R. 11 Eq. 177), and proves insufficient to pay the legacies and annuities given, so that an abatement is necessary, a value will be put upon the annuities as from the testator's death, and the annuitant or his representatives will be entitled to the valued amount after abatement (*Wroughton v. Colquhoun*, 1847, 1 De G. & Sm. 357; *Carr v. Ingleby*, 1827, *ibid.* 362; *Long v. Hughes*, 1831, *ibid.* 364). This principle does not apply to annuities determinable on marriage or bankruptcy (*Carr v. Ingleby*, *supra*; *Greatrix v. Chambers*, 1860, Gif. 321; see also *Wright v. Callender*, 1852, 2 De G. M. & G. 652; *Carmichael v. Gee*, 1880, 5 App. Cas. 588).

Annuity Issuing out of the Land.—If annuities are given as specific gifts of interest in the real estate, they do not abate with legacies charged generally upon the real estate (*Creed v. Creed*, 1844, 11 Cl. & Fin. 491; *In re Briggs*, 1880, 29 W. R. 925). Where legacies and annuities are charged upon real estate, powers of distress and entry conferred upon the annuitants do not give the annuities priority over the legacies (*Roper v. Roper*, 1876, 3 Ch. D. 714).

Abatement of False Lights.—By s. 416 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, if any owner or person is served

by the general lighthouse authority with a notice (under s. 415) directing the extinction or screening of any light, liable to be mistaken for a light proceeding from a lighthouse, and neglects to comply therewith for a period of seven days, the lighthouse authority is empowered to enter upon the place where the light may be and extinguish it. See LIGHTHOUSES.

Abatement of Freehold.—An abatement “into land” occurs where, before the entry of the heirs, a stranger wrongfully enters upon the lands. Such wrongful entry is technically called an abatement, and the stranger so entering an abator, the effect of which is to convert the heir’s seisin in law into only a right of entry. Abatement differs from intrusion, in that it is to the prejudice of the heir, while the latter is to the prejudice of the reversioner or remainder-man. Disseisin differs from both; to disseise is to put forcibly or fraudulently a person seised of the freehold out of possession. If a man, seised of certain lands in fee, had issue two sons, and died seised of such land, and the younger son entered by abatement into the land, the Statute of Limitations did not operate against the elder son (*Littleton*, s. 396; *Sharington v. Shrotton*, 7 & 8 Eliz., Pl. Com. 306; *Page v. Selby*, Bull. N. P. 102; *Doe v. Long*, 1841, 9 Car. & P. 773. By s. 13 of 3 & 4 Will. iv. c. 27, when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, enters into the possession or receipt thereof, such possession or receipt is not to be deemed to be the possession or receipt of or by the person entitled as heir. As to the effect of this section, see *Jones v. Jones*, 1847, 16 Mee. & W. 712.

[Comyn’s *Digest*, 5th ed., vol. i. p. 1; Cruise’s *Digest*, i. 51.]

Abatement of Legacies.—Under certain circumstances, legatees are obliged to part with the whole or portions of their legacies, although the subjects devised to them remained, and were not adeemed (see ADEMPMENT) at the testator’s death. This obligation is termed “abatement” (*Roper on Legacies*, 4th ed., i. 356).

1. **GENERAL LEGACIES.**—In case of a deficiency of assets, all the general legacies must abate proportionately in order to pay the debts, but a specific legacy does not abate at all unless there be not sufficient without it. An executor has no power to give himself a preference in regard to his own legacy, as he has in the instance of his own debt (*Toller*, 347). A residuary legatee cannot claim abatement on the part of general legatees, as they are entitled to have their legacies paid in full, although it should leave no surplus for the residuary legatee (see *Baker v. Farmer*, 1868, L. R. 3 Ch. 537; *Breashur v. Dox*, 1830, 4 Sim. 21).

When a general legacy is given in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, it does not abate with voluntary legacies. So, where a testator makes a general bequest to his wife in lieu of dower, such a legacy will be entitled to a preference of payment over the other general legacies, her election to accept the legacy placing her in the situation of a purchaser of what is given her by the will (*Burridge v. Bradyl*, 1710, 1 P. Wms. 127; *Davenhill v. Fletcher*, 1754, 1 Amb. 244; *Heath v. Dendy*, 1826, 1 Russ. 543; 25 R. R. 135; *Norcott v. Gordon*, 1844, 14 Sim. 258. Such a legacy has no priority, where the testator leaves no real estate out of which the widow is dowable (*Acey v. Simpson*, 1842, 5 Beav. 35), or where the only real estate of the

testator was conveyed to him with a declaration against dower (*Roper v. Roper*, 1876, 3 Ch. D. 714; *In re Greenwood* [1892], 2 Ch. 295).

Pecuniary legacies abate in proportion, notwithstanding a direction in the will that they are to be put "in the first place," or a direction as to the time of payment. If, however, an intention that any legacies are to be paid in full is to be collected, or reasonably inferred, it will be otherwise (*Blower v. Morret*, 1752, 2 Ves. Sen. 419; *Cazenove v. Cazenove*, 1889, 61 L. T. 115; *In re Sweder's Estate* [1891], 3 Ch. 44).

In cases where stock is bequeathed as a general legacy, and the legatee is called upon to abate with other general legatees, the abatement will be regulated by the value of stock at the end of one year next after the testator's death (*Blackshaw v. Rogers*, 1778, cited by the Master of the Rolls in *Simmons v. Vallance*, 1793, 4 Bro. C. C. 349).

In the following instances particular general legatees have, on various grounds, claimed exemption from abatement, but have been held to be liable in common with other general legatees:—

(a) Legacies to servants (*Attorney-General v. Robins*, 1722, 2 P. Wms. 25).

(b) Legacies to Charities (*Attorney-General v. Hudson*, 1720, 1 P. Wms. 675; *Bishop of Peterborough v. Mortlock*, 1784, 1 Bro. C. C. 566).

(c) Legacies of sums of money to executors for their care and trouble (*Duncan v. Watts*, 1852, 16 Beav. 204).

(d) Legacies to creditors whose debts have been previously liquidated by composition at less than their real amounts (*Coppin v. Coppin*, 1725, 2 P. Wms. 292).

(e) Legacies to pay another person's debts.

(f) Legacies of money to be laid out in land or stock.

(g) Legacies for mourning rings or mourning (*Apreece v. Apreece*, 1813; 1 Ves. & Bea. 364).

(h) Legacy to erect a monument (probably); although in *Martin v. Martin*, 1718, 1 P. Wms. 423, Lord Parker, C., exempted such a legacy from abating with the general legacies.

(i) Legacies to wives and children, unless the rule of abatement is excluded by the terms of the instrument, or there is an intention to give priority apparent on the face of it (*Blower v. Morrett*, *supra*; *Cazenove v. Cazenove*, *supra*; *In re Sweder's Estate*, *supra*).

2. **SPECIFIC LEGACIES.**—Specific legatees can only be called upon by the executor for abatement, upon failure of the general personal estate to discharge debts. These legacies, therefore, must be fully satisfied, to the prejudice of general legatees. But when the personal assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate in proportion to the value of their individual legacies (*Sleech v. Thorington*, 1754, 2 Ves. Sen. 561, 564; *Clifton v. Burt*, 1720, 1 P. Wms. 680; *Roper on Legacies*, 4th ed., i. 356).

The principle of the distinction between the two classes of legatees is the presumed intention of the testator to give a preference to those to whom he has bequeathed specific parts of his personal estate, severed from the rest (*Roper on Legacies*, i. 354).

On the same principle, if the testator's freehold estate be subject to debts, a specific devisee of it will be obliged to contribute, upon a deficiency of the general personal assets, with the specific legatee of a chattel (*Long v. Short*, 1717, 1 P. Wms. 402; *In re Saunders-Davies*, 1887, 34 Ch. D. 482; *In re Bowden* [1894], 1 Ch. 693).

3. **DEMONSTRATIVE LEGACIES.**—Legacies in part specific and in part

general, *i.e.* bequests of money with reference to a particular fund for their payment, and not simply a gift of the specific fund itself. Such a legacy is so far general, that, if the fund be called in, or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; but it is specific, in the sense that it will not be liable to abate with general legacies upon a deficiency of assets (*Mann v. Copland*, 1817, 2 Madd. 223; *Creed v. Creed*, 1844, 11 Cl. & Fin. 491; *Livesay v. Redfern*, 1836, 2 Y. & C. C. 90; *Tempest v. Tempest*, 1857, 7 De G., M. & G. 473; *Roberts v. Pocock*, 1798, 4 Ves. 150). See ABATEMENT OF ANNUITIES; ASSETS; LEGACIES.

Abatement of Nuisance.—See NUISANCE.

Abatement of Purchase-Money.—Although, before the Judicature Act, a misdescription rendered a sale void at law, the Courts of equity obliged the purchaser to accept the property, with an abatement of the purchase-money by way of compensation, in cases where he would then obtain the reasonable and substantial benefit of the contract (*Halsey v. Grant*, 1806, 13 Ves. 73, 9 R. R. 143). “The rules of equity now of course prevail (Judicature Act, 1873, s. 25, subs. 4). If a man having a partial interest in an estate chooses to enter into a contract, representing it as his own, and agreeing to sell it as such, it is not competent to him afterwards to say that, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract, and if the vendor chooses to take as much as he can have, he has a right to that and to an abatement, and the Court will not hear the objection of the vendor that the purchaser cannot have the whole” (*per* Lord Eldon, *Mortlock v. Buller*, 1804, 10 Ves. 315, 7 R. R. 417).

And in *Hill v. Buckley*, 1811, 17 Ves. 401, 11 R. R. 109, Sir Wm. Grant observed: “Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be to have what the vendor can give, with an abatement out of the purchase-money, for so much as the quantity falls short of the representation, and that whether there is or is not the usual condition as to compensation, and that is the rule generally, as though land is neither bought nor sold professedly by the acre, the presumption is that, in fixing the price regard was had on both sides to the quantity which both suppose the estate to consist of; and therefore a rateable abatement of the price will probably leave both parties in nearly the same relative situation in which they would have stood if the quantity had been originally known.” But the abatement will not be rateable if it appears that the parties have calculated the value on some other basis (*Hill v. Buckley*, *supra*). The right of the purchaser to such relief may be rebutted by evidence of his knowledge of the actual state of facts at the time of the purchase (*Dyer v. Hargrave*, 1805, 10 Ves. 505, 8 R. R. 36). There must be proof of knowledge, for it will not be presumed from circumstances rendering it possible that he possessed it (*R. v. Wilson*, 1843, 6 Beav. 124).

[See *Horrock v. Rigby*, 1878, 9 Ch. D. 180; *Durham v. Legard*, 1865, 34 L. J. Ch. 589; *Barker v. Cox*, 1876, 4 Ch. D. 664; *McKenzie v. Hesketh*, 1877, 7 Ch. D. 675.]

Abatement or Rebate (In Commerce).—An allowance of discount made for prompt payment.—The term is also sometimes used to express the deduction that is occasionally made at the custom-house from the duties chargeable upon damaged goods, and for a loss in warehouses.

Abatement, Pleas in.—Under the old system of pleadings, pleas which, without either admitting or denying the existence of the cause of action, alleged some matter of fact which would in law preclude the plaintiff from recovering upon the writ and declaration as then framed, were called pleas in abatement. They belonged to the class of dilatory pleas (*q.v.*), as distinct from pleas in bar (see **BAR, PLEAS IN**), because they raised a formal defence not affecting the merits. Such pleas would assert the non-joinder of some necessary party, or that either party was under some personal disability, or that another action was already pending for the same cause. But now, by Order 21, r. 20, all pleas in abatement are abolished. The proper procedure now in such cases is explained in *Kendall v. Hamilton*, 1879, 4 App. Cas. 504; *Pilley v. Robinson*, 1887, 20 Q. B. D. 155; and *Wilson v. Balcarres Brook Steamship Co.* [1893], 1 Q. B. 422.

Abbey, Abbot.—An abbey denoted the place of habitation of a society of persons, male or female, leading a religious life, of which the head was known as an Abbot or Abbess. With regard to cathedral abbeys, as the bishop was considered the abbot, the presbyterial superior of these bodies was described as a prior or prioress. At common law these bodies were recognised as corporations, and the individual members of such corporations, other than lay members, are regarded in the eyes of the law as *civiliter mortui*. There were also other religious foundations of different kinds similarly recognised, but all abbeys, priories, and other religious foundations of a like kind were dissolved chiefly by legislative action either before, or for the most part during, the Reformation (see 27 Hen. VIII. c. 28; 31 Hen. VIII. c. 13; 37 Hen. VIII. c. 4; Edw. VI. c. 14). Since the date of the Reformation, no body of any kind professing to be a religious community has been recognised as such by the law. See also **PRIORY, PRIOR**. See also **ROMAN CATHOLIC; CHARITY**; and as to abduction of nuns, **ABDUCTION**. For abbey lands, see **TITHES**. As to the legal position of present religious orders and the restrictions to which they are subject under statute or otherwise, see **RELIGIOUS ORDER, JESUIT**.

Abbuttals.—The line of demarcation between adjoining properties. Properly speaking the word was used for the ends of strips of lands; the sides being called *adjacentes*.

Abdication.—English constitutional history supplies no precedent of a voluntary abdication of the crown. Edward II. was deposed; a Parliament having been irregularly summoned, articles were drawn up declaring him unfit to reign, and commissioners were sent to request his assent to his son's succession. This he gave, and Sir William Trussell, as proctor for the whole Parliament, renounced their allegiance (Stubbs, c. xvi. 255). Richard II. was induced to execute a deed of resignation in which he absolved all

his people from the oaths of fealty and homage and all other bonds of allegiance, royalty, and lordship by which they were bound to him; but this was not thought enough, and Parliament proceeded to draw up articles against him, which the Estates voted were sufficient ground for deposing him. Then Henry of Lancaster claimed the crown, and was accepted by Parliament, and commissioners were sent to signify to Richard his deposition, and renounce their allegiance (Stubbs, c. xvi. 269; c. xviii. 302). It was debated in the Convention Parliament at the Revolution whether the throne was vacant between Richard's resignation and the enthroning of Henry IV. (see Macaulay). In the case of James II., the Convention resolved that, "King James II. having endeavoured to subvert the constitution of the kingdom by breaking the original contract between king and people, and having, by the advice of Jesuits and other wicked persons, violated the fundamental laws and withdrawn himself out of the kingdom, has *abdicated* the government, and that the throne is thereby vacant." The Lords wished to substitute "deserted" for "abdicated," which, it was contended, was a word not known to English law, but the amendment was rejected, as leaving it open to James to return (see debate on the word "abdicated" in 5 Parl. Hist. 61, especially the future Lord Somers, p. 69). The Declaration of Rights simply recites that James had abdicated the government, and that the throne was thereby vacant. It seems to have been the general opinion in the debate above mentioned that a sovereign could lawfully abdicate; but it would not appear that an abdication could be fully carried out at the present day without an Act of Parliament.

Abduction.—1. A term originally used with reference to the taking of a person, not *sui juris*, out of the possession or custody of husband, parent, or legal guardian. Abduction of women was common during the Middle Ages, being regarded as gallantry rather than crime, and probably a survival of marriage by capture (Pollock and Maitland, *Hist. Eng. Law*, ii. 363; Pike, *History of Crime*, i. 266, 477). At common law the remedies were by indictment or action for false imprisonment, if the person abducted was unwilling (3 Co. Inst. 55), or by action on the case (*q.v.*) by husband, parent, or guardian, for the pecuniary loss sustained by him, or by writ *de homine replegiando* (Lord Grey's case, 1682, 9 St. Tri. 127; Show. 61, 76; *Calthrop v. Axtel*, 1687, 3 Mod. 169; F. N. B. 66; 2 Co. Inst. 55. This writ is now disused and the writ of *habeas corpus* is employed instead (2 Co. Inst. 55; and see ADULTERY; HABEAS CORPUS; SEDUCTION).

Abduction has been the subject of much legislation since the Statute of Merton (20 Hen. III. c. 6), all repealed and superseded by statutes of this reign, with the following exceptions:—

No larceny could be committed by taking or carrying away a ward or villein, "because they are in the realty" (3 Co. Inst. 109). But by Stat. Westm., 13 Edw. I. c. 35, it is a misdemeanour punishable by two years imprisonment to take or carry away (*rapere vel abducere*), any infant, male or female, whose marriage belongeth to another (see 2 Co. Inst. 437). Where the child is a ward of the High Court, abduction is also punishable as contempt of Court (*Herbert's Case*, 1731, 3 P. Wms. 116).

By c. 34 of the same statute (also unrepealed), if a wife is carried away (*abducta*) with the goods of her husband, the "king shall have the suit for the goods so carried away." If a wife elopes, she forfeits her dower, unless her husband takes her back and is reconciled to her without coercion of the Church (2 Co. Inst. 435); and she can now also be indicted jointly with the

adulterer for larceny (45 & 46 Vict. c. 75, ss. 12, 16; *R. v. Brittleton*, 1884, 12 Q. B. D. 266). The same chapter makes it a misdemeanour, punishable with imprisonment for three years and fine "at the king's will," to abduct a nun from the nunnery (*domus*), "even though she consent." Her church lord, the abbess or prioress, had also an action of trespass on the case against the offender (see 2 Co. Inst. 433-436, Reg. Jud. 71, 269). Though nunneries are not now illegal (10 Geo. IV. c. 7, s. 37), the change, since the Reformation, in the policy of the law as to monastic vows and institutions, makes it strange that the enactment has not been expressly repealed. The subsequent acts from 3 Hen. VII. c. 2, except the Habeas Corpus Acts, being now repealed, it is enough to refer to Hawk., P. C., bk. i. c. 42; 1 East, P. C., 452, 457; 4 Black. Com., 288; 3 Russ. on Crimes, 6th ed., 260-266; and the *Wakefield Case*, 1827, 2 Lew. C. C. 1, and special report published by Murray in 1827.

Abduction of females is now *felony* in three cases—(a) Where any person from motives of lucre takes away or detains, *against her will*, any woman of any age who has any interest in any property, or any even presumptive expectation of property as heiress or next of kin, with intent to marry or defile her, or to cause her to be married or defiled (24 & 25 Vict. c. 100, s. 53). (b) Where any person with such intent fraudulently allures, takes away, or detains *out of the possession and against the will of parent or lawful custodian*, any woman *under twenty-one*, entitled to property as above described (24 & 25 Vict. c. 100, s. 53). (c) Where any person with such intent, by force, takes away or detains *against her will*, any woman of any age (24 & 25 Vict. c. 100, s. 54).

All these felonies are punishable by penal servitude for from three to fourteen years, or imprisonment for not more than two years (24 & 25 Vict. c. 100, ss. 53, 54; 54 & 55 Vict. c. 69, s. 1), and are not triable at Quarter Sessions. A person convicted of offences (a) or (b) becomes incapable of taking any estate or interest whatever in the property of the abducted woman; and if the abduction has resulted in marriage, the High Court, on the application of the Attorney-General, must settle her property (24 & 25 Vict. c. 100, s. 53). The provision is similar to that of the Marriage Act, 1823 (4 Geo. IV. c. 76, s. 37), as to marriages solemnised between parties under age by means of false oath or fraud. See MARRIAGE.

There is no decision on these sections, except *R. v. Burrell*, 1864, 33 L. J. M. C. 54, a charge of fraudulent allurement under s. 53, which failed on the facts. For cases on the superseded Acts, see 3 Russ. on Crimes, 6th ed., 251-7; Arch. Cr. Pl., 21st ed., 801-3. The accused and his or her husband or wife are now competent but not compellable witnesses, except before the Grand Jury (48 & 49 Vict. c. 69, s. 20). As to the old law, see 3 Russ. on Crimes, 6th ed., 666. Under Lord Hardwicke's Act (26 Geo. II. c. 33), marriage after abduction was void, but now it is at most voidable, if the consent of the woman was obtained by fraud or duress (*Scott v. Sebright*, 1886, 12 P. D. 21; *Ford v. Stier*, 1896, Prob. 1).

Abduction of females is a *misdemeanour* in two cases—(1) Where an unmarried girl under sixteen is unlawfully taken out of the possession and against the will of her parent or proper custodian (24 & 25 Vict. c. 100, s. 54). (2) Where an unmarried girl under sixteen is taken out of the possession and against the will of her parent or proper custodian, with intent that the girl should be unlawfully and carnally known by any man (48 & 49 Vict. c. 69, s. 7).

Both these misdemeanours are punishable by imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 100, s. 55; 48

& 49 Vict. c. 69, s. 7). Reasonable belief that the girl was sixteen, or over, is no defence to the former offence (*R. v. Prince*, 1875, L. R. 2 C. C. R. 122; but reasonable grounds for belief that the girl was sixteen, or over, are an answer to a charge for the second offence (48 & 49 Vict. c. 69, s. 7; *R. v. Packer*, 1886, 16 Cox, C. C. 57).

The consent of the girl is no defence in either case (*R. v. Mankleton*, 1853, 22 L. J. M. C. 115), nor could she, it would seem, be charged for taking part in the offence (see *R. v. Tyrrell* [1894], 1 Q. B. 710). It must be proved that she was in possession or custody of parent, guardian, or employer, to the knowledge of the accused (*R. v. Olifier*, 1866, 10 Cox C. C. 402; *R. v. Miller*, 1876, 13 Cox C. C. 179; *R. v. Henkens*, 1887, 16 Cox C. C. 257; *R. v. Hibbert*, 1869, L. R. 1 C. C. R. 184), and was actually taken away therefrom against the will of the custodian, by fraud on him, and by persuasion, allurement, or inducement held out by the accused. For other decisions, see Arch. Cr. Pl., 21st ed., 803-7; 3 Russ. on Crimes, 6th ed., 253, 258.

The accused and his or her husband or wife are competent, but not compellable witnesses, except before a Grand Jury (48 & 49 Vict. c. 69, s. 20). The procedure of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41, ss. 12, 15, 16, 17 & sch.), is applicable in the case of a girl under sixteen, and s. 17 throws on the defendant, in certain events, the proof that the girl is sixteen, or over. See CHILDREN, CRUELTY TO.

As to detention of woman in brothel, see BROTHEL.

2. The term abduction is also applied to "kidnapping" or "trepanning," or the forcible stealing and carrying away any person of either sex, or any age—which constitutes the common law misdemeanour of assault and false imprisonment, and, when the victim is taken abroad, falls within the Habeas Corpus Act, 1679 (see *Designy's Case*, 1682, Sir T. Ray. 474)—and to the statutory felony of child-stealing (24 & 25 Vict. c. 100, s. 56). See KIDNAPPING.

3. Any person who, by abduction or duress, interferes with the free exercise by a voter of his franchise, at any parliamentary or municipal or local government election, is guilty of "undue influence" (*q.v.*), which is a misdemeanour, punishable on indictment by imprisonment for not more than one year, or a fine not exceeding £200, and a "corrupt practice," entailing disqualification to vote, sit in Parliament, or hold municipal office for seven years (45 & 46 Vict. c. 50, s. 77; 45 & 46 Vict. c. 51, ss. 2, 6; 47 & 48 Vict. c. 70, s. 2; 51 & 52 Vict. c. 41, s. 75; 56 & 57 Vict. c. 73, s. 48). The offence is now rarely committed. The only reported case is *H.M. Advocate v. Douglas*, 1866, 5 Irvine, 265, decided under 17 & 18 Vict. c. 102, s. 5, of which 46 & 47 Vict. c. 51, s. 2, is a re-enactment; but a prosecution was directed also in the *Borough of Lisburn* case, 1868, Wolf & B. 227. And see CORRUPT PRACTICES.

Abearance (Conduct, Behaviour).—A recognisance to be of good abearance is equivalent to a recognisance to be of good behaviour (4 Black. Com. 251 and 256).

Abettor.—A person is said to aid or abet the commission of an offence when, though he does not himself do the act which constitutes it, or is not the principal offender or actor, he is present when it is committed, with the object of facilitating its commission (*præsens est abettans aut*

auxilians actorem ad feloniam faciendam), or, if absent, intends to facilitate its commission, and is near enough to do so, should occasion arise. The element of common criminal purpose must link the actor (*auteur*) with the persons who are charged with aiding and abetting him; and the charge preferred must be one of a crime committed in the execution of the common purpose, and not foreign to it (see Stephen, *Dig. Crim. Law*, 5th ed., arts. 38, 39, and for case law, 1 Russ. on *Crimes*, 6th ed., 162-170). The abettor must take part not only in the formation but in the execution of the criminal purpose. If he does not, he is a co-conspirator only, or an accessory before the fact. He must be present when the crime is committed. Constructive presence is said to be sufficient; but this means that he must be within reach, *e.g.* where a confederate is watching for the police, while a burglary is being executed (1 Russ. on *Crimes*, 6th ed., 162), and where the *modus operandi* involves transmission through an innocent agent, *e.g.* of poison by a messenger, or a libel by the post, presence at the *locus a quo* is sufficient (3 Co. Inst. 138, Fost., 2nd ed., 349; 1 Russ. on *Crimes*, 6th ed., 167). Since the sixteenth century, it has been well settled that all persons present, aiding or abetting, are principals, and that their trial is not subject to the same incidents as that of an accessory before, on, or after the fact (see ACCESSORY). But so long as any felony was punishable by statute by death without benefit of clergy (*q.v.*), the judges were astute to distinguish between principals in the first degree and principals in the second degree, *i.e.* aiders and abettors.

[See Fost., 2nd ed., 348, 355-359; 2 Stephen, *Hist. Crim. Law*, 230; Arch. Cr. Pl., 21st ed., 1110; 3 Russ. on *Crimes*, 6th ed., 161.]

The legal reason for the distinction has vanished with the alteration of the scale of punishments for crime, and now aiders and abettors, either in treason, felony, or misdemeanour, in the absence of specific statutory provision to the contrary, are punishable to the same extent as the actual perpetrator of the offence. This had always been the common law rule as to treason and misdemeanour (Fost., 2nd ed., 341), and apparently as to felonies whose punishment was not regulated by statute ousting benefit of clergy (Fost., 335; 2 Stephen, *Hist. Crim. Law*, 230). It is now the statutory rule as to all misdemeanours, whether at common law or under acts passed before or since 1861 (24 & 25 Vict. c. 95, s. 8), and as to felonies under the other Criminal Law Consolidation Acts of that year (24 & 25 Vict. c. 96, s. 98 (*larceny*); c. 97, s. 56 (*malicious damage*); c. 98, s. 49 (*forgery*); c. 99, s. 35 (*coinage offences*); and c. 100, s. 67 (*offences against the person*); and as to *piracy* by 7 Will. IV. & 1 Vict. c. 88, s. 4). Aidors and abettors of offences punishable on summary conviction are also tried and punished as principals (Summary Jurisdiction Act, 1848, 11 & 12 Vict. c. 43, s. 5; 24 & 25 Vict. c. 69, s. 99; c. 97, s. 63).

An abettor can be tried either with, before, or after the principal offender. As to form of indictment, see Arch. Cr. Pl., 21st ed., 1110; 1 Russ. on *Crimes*, 6th ed., 169. Except where there is a difference in punishment between principals in the first degree, and those in the second degree, both can be charged jointly with commission of the offence, without the addition of any special averment that the principals in the second degree were present aiding and abetting (see 3 Russ. on *Crimes*, 6th ed., 169).

A person may be convicted of aiding and abetting the commission of an offence in which he or she could not be principal, *e.g.* a woman or boy under fourteen of aiding rape (*R. v. Ram*, 1893, 17 Cox, C. C. 609; *R. v. Warte* [1892], 2 Q. B. 600), or a solvent person of aiding a bankrupt to commit offences against the bankruptcy laws.

Abeysance.—This term, derived from the old French word *baser*, to expect, denotes the condition of an inheritance without a present owner. Thus, on the death of an incumbent, the freehold of the benefice is said to be in abeyance until the next incumbent takes possession; and if a man make a lease of lands to A. for life, with remainder to the heir of B., the fee-simple is in abeyance till B.'s death. An estate tail also might fall into abeyance by the attainder of the tenant in tail. The term is perhaps most commonly used at the present day in the case of a peerage inheritable in the female line, which, if it descends to two or more co-heiresses, is said to be in abeyance between them. See CONTINGENT REMAINDERS; PEERAGE.

Abigeat.—1. Said to be occasionally used by medical writers as an equivalent for abortion, artificially caused. See Ash. *Dict.*; Forcell. *Lex. Tot. Lat.*, s.v. "Abiga."

2. Cattle lifting. See ABIGEUS.

Abigeus or Abigevus (late Latin for *abactor*).—A term of Roman law applied to cattle-lifters, i.e. persons who make a business of driving off (*abigunt*) cattle from their pastures or herds, as distinguished from thieves (*fures*) (*Dig. lib. xlvii. tit. 14*; Forcell. *Lex. Tot. Lat.*, s.v. "Abactor," "Abigeus," "Abigeatus"). It did not apply to taking single stray beasts (*Du Cange, Gloss.*, s.v.). "*Abactores sunt qui unum equum, duas equas, totidemque boves, vel capras decem aut porcas quinque abegerint*" (Paul. Sent. 518, s. 1). Its punishment as a crime in Roman law depended on a rescript of Hadrian, and there is no warrant for treating cattle-lifting as an offence in any way distinct from larceny or robbery in English common law, except a single passage in Bracton, probably lifted by him from Azo, or some other early civilian. See *De Legg. Ang. lib. iii. "De actionibus," c. viii. f. 105.*

Ability.—The meaning of this term, as it occurs in 9 Geo. IV. c. 14 (Lord Tenterden's Act), s. 6, was elaborately discussed in *Lyle v. Barnard*, 1836, 1 Mee. & W. 101, which was an action on the case for falsely representing, in answer to inquiries on that subject, that a life interest in certain trust funds was charged only with three annuities, there being in fact a mortgage for £20,000 in addition, whereby the plaintiff was induced to advance money secured by covenant, bond, warrant of attorney, and an assignment of the life interest in the said trust funds. The representation was made by parol. At the trial the plaintiff was non-suited on the ground that the case fell within the above-mentioned section, which provides that "no action should be maintained whereby to charge any person upon, or by reason of, any representation or assurance made or given, concerning or relating to the character, conduct, credit, *ability*, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (*sic*), unless such representation or assurance be made in writing, signed by the party to be charged therewith." On the motion for a new trial, the Court was equally divided, Lord Abinger and Gurney, B., holding that the case fell within the section, as being a representation concerning the borrower's *ability* to perform an engagement of a pecuniary nature; Barons Parke and Alderson holding that it did not, on the ground that the representation related to the trust fund only, and in no way to the personal credit of the borrowers; that the word *ability*, looked

at in its ordinary sense, meant some quality belonging to the third party, and not to the thing to be transferred. See *Swanns v. Phillips*, 1838, 8 Ad. & E. 457; *Bishop v. Balkis Consolidated Co.*, 1890, 25 Q. B. D. 512.

Ab initio.—When authority or licence is given to anyone by the law, and he abuses it, he becomes a trespasser *ab initio*; but where an authority or licence is given by the party, and he abuses it, he must be punished for the abuse, but is not a trespasser *ab initio*. The reason of the difference being that, in the case of a general authority, or licence of law, the law adjudges by the subsequent act with what intention the trespasser entered; but when the party gives an authority or licence himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or licence. The law gives authority to enter into a common inn or tavern; to the lord to distrain; to the owner of the ground to distrain damage-feasant; to the owner in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle. But if he who enters into the inn or tavern doth a trespass—as, if he carries away anything, or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the distress; or if he, who enters to see, waste, break the house, or stays there all night; or if the commoner cuts down a tree;—in these and the like cases the law adjudges that he entered for that purpose, and because the act which demonstrates it is a trespass he shall be trespasser *ab initio* (*The Six Carpenters* case, 8 Jac. i.; 8 Co. Inst. 146 (a)).

A mere nonfeasance does not amount to such an abuse as renders a man a trespasser *ab initio*—s.c., as a refusal to do something one ought to do (*Jacobson v. Blake*, 1844, 6 Man. & G. 925; *West v. Nibbs*, 1847, 4 C. B. 172), where it was held that a landlord who accepted the rent in arrear, and expenses, after impounding a distress, and then retained possession of the goods distrained, was only guilty of a nonfeasance, and therefore not a trespasser *ab initio*, though he might be liable for a conversion of the goods to his own use. The abuse of a distress made a trespass *ab initio* at common law, but the statute 11 Geo. II. c. 19, s. 19, provides that no “unlawful act” afterwards done by the distrainers shall make the distress for rent actually due unlawful, or the distrainer a trespasser *ab initio*, but that the party aggrieved by such unlawful act shall recover full satisfaction for the special damage sustained thereby, and no more.

Abjuration—A renunciation by oath.—At common law, it signified the oath of a person who had taken sanctuary, to leave the realm. This was abolished by 12 Jac. I. c. 28. In the reign of William III., an oath of abjuration was, by 13 Will. III. c. 16, to be “tendered to every person entering any public office, to the effect that they renounced the title of the pretended Prince of Wales,” i.e. the son of King James II., to the English throne and the rights of the present dynasty under the Act of Settlement (q.v.). (See also 1 Geo. I. c. 2, s. 13.) This Act was altered and continued by 6 Geo. III. c. 53. A different form of oath for the oath of supremacy, allegiance, and abjuration, was substituted for the old oaths by 30 & 31 Vict. c. 75, s. 5, and 31 & 32 Vict. c. 72 (see PROMISSORY OATHS; OATH OF ALLEGIANCE). Divers enactments and oaths relating to the subject of abjuration are repealed by the Promissory Oaths Act, 1871, 34 & 35 Vict. c. 48.

The word is also used to signify a formal retraction of religious error.

A form of abjuration for admitting converts from the Church of Rome was drawn up by one of the Houses of Convocation in 1714, but did not receive royal sanction (see Cordwell's *Synodalia*).

Able-bodied Seamen.—See SHIPPING.

Ablutions.—See COMMUNION.

Abode (Habitation, Place of Residence).—"A man's residence, where he lives with his family and sleeps at night, is always his place of abode, in the full sense of that expression" (*per* Lord Campbell, C. J., *R. v. Hammond*, 1852, 17 Q. B. 772; 21 L. J. Q. B. 153). "There is no strict or definite rule for ascertaining what is inhabitance or residence. The words have nearly the same meaning. Sleeping once or twice in a place would not constitute inhabitance. There is no precise line to be drawn. It is always, if the inhabiting is *bonâ fide*, a question of more or less. The question is whether there has been such a degree of inhabitance as to be in substance and in common sense a residence. When a person has a country and a town house, it is a mere question of fact whether he has two or only one residence" (*per* Blackburn, J., *R. v. Mayor of Exeter*; *Wescomb's case*, 1868, L. R. 4 Q. B. 110). "A person may inhabit a place without sleeping there, or he may sleep there without inhabiting it. The fact that a person sleeps in a place is generally a very important ingredient in deciding whether he inhabits it, but it is not conclusive" (*per* Blackburn, J., *R. v. Mayor of Exeter*; *Dispitale's case*, 1868, L. R. 4 Q. B. 114).

The term, however, does not invariably bear the same meaning; for some purposes a place of business may be regarded as equivalent to abode. Thus, in a notice of action, a solicitor may give his place of business as his "place of abode," though he resides at another place (*Roberts v. Williams*, 1835, 4 Dowl. 486; 5 L. J. M. C. 23).

In *Courtis v. Blight*, 1861, 31 L. J. C. P. 48; 5 L. T. 450, decided under the Registration Act, 6 Vict. c. 18, s. 7, it was said by Erle, J., that what is a person's abode is rather a question of fact than law.

In *Mason v. Bibbey*, 1864, 2 H. & C. 881; 33 L. J. M. C. 105, it was decided that where under s. 150 of the Public Health Act, 1848, a notice was required to be served, either personally or by delivering it to some inmate of the owner's or occupier's place of abode, a place of business was a "place of abode." A place of abode is of course not equivalent to domicile. • See DOMICILE; LAST PLACE OF ABODE; REGISTRATION OF VOTERS; USUAL PLACE OF ABODE.

Abominable Crime is a statutory description of "buggery," which comprises (1) sodomy, or carnal knowledge *per anum* of a human being by a male person (*R. v. Jacobs*, 1817, Russ. & R. 231), and (2) bestiality, or carnal intercourse in any manner between a human being and *any* animal (*R. v. Brown*, 1890, 24 Q. B. D. 357). Prior to 1533, these acts, though regarded by law writers as crimes, were usually treated as vice or sin punishable by ecclesiastical sanctions (1 East, P. C., ch. xiv. p. 480; 3 Co. Inst. 58; 1 Hawk., P. C., bk. i. ch. 4; 3 Russ. on Crimes, 6th ed., 249; 2 Stephen, *Hist. of Crim. Law*, 429; Pollock and Maitland, *Hist. Eng. Law*,

ii. p. 554). Their commission was made felony punishable by death, without benefit of clergy (*q.v.*), by 25 Hen. VIII. c. 6 (made perpetual by 32 Hen. VIII. c. 3, modified by 2 & 3 Edw. VI. c. 29, repealed by 1 Mar. St. 1, c. 1, s. 3, revived, confirmed, and made perpetual by 5 Eliz. c. 17, and ultimately superseded by 9 Geo. IV. c. 31, ss. 1, 15, 17).

1. These offences are now felony punishable by penal servitude for life, or not less than three years, or by imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 100, s. 61; 54 & 55 Vict. c. 69, s. 1); and are not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1). See QUARTER SESSIONS. Proof of penetration, but not of emission, is necessary to constitute the offence (24 & 25 Vict. c. 100, s. 63). [As to medical evidence of the commission of the offence, see Luff, *Forensic Medicine*, ii. 273.]

2. An attempt, or assault with intent, to commit this felony, or indecent assault on a male person, is a misdemeanour punishable by penal servitude for from three to ten years, or imprisonment for not more than two years (24 & 25 Vict. c. 100, s. 62; 54 & 55 Vict. c. 69, s. 1), and is triable at Quarter Sessions. On an indictment for the felony, the jury may convict of the attempt (14 & 15 Vict. c. 100, s. 9). Consent is no answer to an indictment for the felony, but is so on a charge of assault with intent or indecent assault (*R. v. Wollaston*, 1872, 12 Cox C. C. 180), except where the person assaulted is under thirteen (43 & 44 Vict. c. 45, s. 2). As to the liability of females for participation in these offences, see 3 Co. Inst. 59; 3 Russ. on *Crimes*, 6th ed., 249; and males under fourteen cannot be convicted of the felony (3 Co. Inst., 59); but may, it would seem, be convicted of the misdemeanour (*R. v. Waite* [1892], 2 Q. B. 600; *R. v. Williams* [1893], 1 Q. B. 320). [For the forms of indictment, see 3 Russ. on *Crimes*, 6th ed., 250, 251; Arch. Cr. Pl., 21st ed., 830-832.]

3. Committing or procuring the commission of acts of gross indecency (even not amounting to sodomy, and even if assented to) in public or in private with a male person is a statutory misdemeanour, punishable by imprisonment for not more than two years (48 & 49 Vict. c. 69, s. 11). It is not triable at Quarter Sessions (same Act, s. 17). The accused is a competent but not compellable witness (same Act, s. 20). [As to this offence, see *R. v. Rowed*, 1842, 11 L. J. M. C. 74; *R. v. Jones* [1896], 1 Q. B. 4.]

4. Solicitation or incitement to commit, or to attempt to commit, any of the above offences is an indictable misdemeanour (*R. v. Ransford*, 1874, 13 Cox C. C. 9; 2 Russ. on *Crimes*, 6th ed., 251, note (w)).

5. The above offences (1, 2, 4), are "infamous crimes," within 24 & 25 Vict. c. 100, ss. 46, 47, 48, which make it felony for any person, with intent to extort, to accuse, or threaten to accuse, of such offence, or to induce any person to execute a valuable security by such threat or accusation. See INFAMOUS CRIMES; MENACES.

6. A wife may divorce her husband if he is guilty of sodomy or bestiality (20 & 21 Vict. c. 85, s. 27). See DIVORCE.

Aborigines, Protection of.—After 1833, when the Emancipation Act put an end to slavery throughout the British colonies, a movement connected with the same humanitarian object was set on foot, to protect the aborigines also from the cruelty of colonists.

This movement led to the formation of a Select Committee of the House of Commons, "to consider what measures ought to be adopted with regard to the native inhabitants of countries where British settlements are made, and to

the neighbouring tribes, in order to secure to them the due observance of justice and the protection of their rights, to promote the spread of civilisation among them, and to lead them to the peaceful and voluntary reception of the Christian religion" (see Report of this Committee, 1837).

Along with this Committee came into existence the well-known Aborigines Protection Society, an institution which has done much for the realisation of its purposes and still finds no lack of work to do.

The British Legislature has dealt with the aborigines question in two Acts—The Kidnapping Act, 1872, for the Prevention and Punishment of Criminal Outrages upon Natives of the Islands of the Pacific Ocean, 35 & 36 Vict. c. 19; and the Pacific Islanders Protection Act, 1875, 38 & 39 Vict. c. 51, extending the provisions of the Kidnapping Act.

Besides these special Acts, there are clauses in some of the Colonial Constitutions specially protecting the aborigines from violence or injustice by colonists. The British North America Act, 1867, 30 & 31 Vict. c. 3, contains a clause (s. 6, subs. 24) framed with this object, and the Canadian Parliament has passed at least two laws in favour of the aborigines.

In the New Zealand Constitution Act, 9 & 10 Vict. c. 103, it is enacted (s. 10) that it shall be lawful for Her Majesty to make provision for the maintenance of native laws in all cases where the English law is repugnant to the natives, and to set apart particular districts where native laws should be observed. This provision is repeated in the Act to grant a representative Constitution to New Zealand (15 & 16 Vict. c. 72), which also contains a clause (s. 73) forbidding colonists from trafficking in land with the aboriginal natives, and declaring that the aborigines shall have no power to make over any land belonging to them, to colonists or persons other than aborigines.

Under Art. 9 of the General Act of the African Conference, 1885, the signatory States agreed to do everything in their power to put an end to the slave trade within their spheres of influence; and the preamble of the General Act of the Brussels Conference, 1889-90, further states that the signatory States are equally animated by the firm intention of protecting effectively the aboriginal populations of Africa." The latter general Act, which is the charter of native rights in Africa, deals not only with the slave trade carried on by the Arabs in Africa, but with the various methods employed by European "civilisation" for the extermination and degradation of aborigines (see *Blue Book*, "Africa," No. 8A, 1889).

Abortion, or miscarriage, as a legal term, means expulsion of the contents of the womb of a pregnant woman at any period of gestation short of the full term. To cause abortion is unlawful, unless it is done in good faith for the purpose of saving the life of the mother. As to the medical aspects of abortion, see Luff, *Forensic Medicine*, ii. pp. 173-187.

1. Any pregnant woman who, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or unlawfully uses any instrument, or other means whatsoever, is guilty of felony. This offence was first created by 24 & 25 Vict. c. 100, s. 58.

2. Whosoever, with intent to procure the miscarriage of any woman, *whether pregnant or not*, unlawfully administers to, or causes to be taken by, her any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever, is guilty of felony (24 & 25 Vict. c. 100, s. 58), re-enacting 7 Will. iv. & 1 Vict. c. 85, s. 6, with the addition of the words in *italics*. Both these offences are punishable by penal servitude for life or

not less than three years, or by imprisonment for not more than two years (24 & 25 Vict. c. 100, s. 58; 54 & 55 Vict. c. 69, s. 1); and are not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1). A thing to be "noxious" must be such as, in the quantity administered or taken, is capable of causing harm (*R. v. Cramp*, 1880, 5 Q. B. D. 307; *R. v. Hennah*, 1877, 13 Cox C. C. 547). Manual delivery is not necessary to constitute "administration," nor need the accused be present when the substance is actually taken (see *R. v. Wilson*, 1857, 26 L. J. M. C. 18). Where an instrument is used which might be innocently employed, the intention of the accused may be proved by evidence of his causing other miscarriages by the same means (*R. v. Dale*, 1889, 16 Cox C. C. 703; and see *Makins v. Attorney-General for New South Wales* [1894], App. Cas. 57).

The decisions on this and prior Acts are given in detail in 3 Russ. on *Crimes*, 6th ed., 218; and at Arch. Cr. Pl., 21st ed., 824. See also Mayne, *Criminal Law of India*, 1896, p. 629.

3. Procuring the abortion of a quick child is said to be a common-law misdemeanour (Hawk., P. C., bk. i. ch. 3, s. 16; 3 Co. Inst. 51); and is murder, if the child is born alive but dies in consequence of its premature birth, or of the means employed (*R. v. West*, 1848, 2 Car. & Kir. 784; 3 Russ. on *Crimes*, 6th ed., 6, 218). Whoever by unlawful attempts to cause abortion kills the mother is guilty of murder (*Tinkler's case*, 1781, 1 East, P. C., c. 8, s. 17, p. 230). But a person who obtains a noxious substance for a woman at her request, to procure her own miscarriage, which she takes with fatal results, has been held not to be an accessory before the fact to murder (*R. v. Fretwell*, 1862, L. & C. 161).

4. The general law as to accessories applies to these offences (see ACCESSORY). A woman who is pregnant may be convicted for conspiracy with others to procure her own miscarriage (*R. v. Whitchurch*, 1890, 24 Q. B. D. 420).

5. It is a misdemeanour to supply or procure any poison or noxious thing, or any instrument or thing whatsoever, with knowledge that it is meant to be unlawfully used with intent to procure the miscarriage of any woman, whether she is with child or not (24 & 25 Vict. c. 100, s. 59). The offence is punishable by penal servitude for three to five years, or imprisonment for not more than two years (54 & 55 Vict. c. 69, s. 1), and is triable at Quarter Sessions. See QUARTER SESSIONS. The section applies, although the felonies under 24 & 25 Vict. c. 100, s. 58, are not committed or attempted, or even contemplated, except by the person procuring or supplying the means (*R. v. Hillman*, 1864, 33 L. J. M. C. 60).

About.—When in a contract of sale the statement of the quantity to be delivered is qualified by the addition of such words as "about," "say about," "more or less," the vendor is allowed a reasonable latitude in performance, unless, on a proper construction, such terms are to be regarded as words of contract and not merely of estimate and expectation (*McConnel v. Murphy*, 1873, L. R. 5 P. C. 203; *Alcock v. Leuw*, 1883, 1 C. & E. 98. In *Morris v. Leeson*, 1876, L. R. 1 C. P. D. 155, a charter party provided that the ship should proceed to the port of lading, and there load "a full and complete cargo of iron ore, say about 1100 tons." The charterer provided a cargo of 1080 tons, the actual capacity of the ship being 1210 tons. It was held that the words "say about 1100 tons" were not mere words of expectation but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity, but that 3 per cent. was a

fair amount of excess over 1100 tons to allow in estimating what was a full and complete cargo of about 1100 tons, and consequently the cargo actually provided fell short of the charterer's obligation by 53 tons. See Stroud's *Judicial Dictionary*, in loc.

Abridgment (a Digest or Epitome).—The title used by a number of eminent writers to describe their digests of the laws of England. The most famous and authoritative works of this description are:—

Statham's *Abridgment*, temp. Edw. iv.—Statham was a Baron of the Exchequer; his work contains cases from the year-books, arranged under titles down to the end of the reign of Henry vi., and, according to Bridgman (*Legal Bibliography*, 1807), it is evidently the first attempt made to methodise our law as contained in the decisions from the reign of Edward i. in the Courts of law, and it contains many original authorities not extant in the year-books of those times. It was printed in French, quarto, without title, date, or author's name, but is supposed to have been printed by Wm. Le Tailleur at Rouen, for Pynson, between 1470 & 1490.

Fitzherbert's *Grand Abridgment*, temp. Hen. viii.—Published in 1514; a digest of the substance of the year-books down to 21 Henry vii.

Brooke's *Grand Abridgment*.—First printed in quarto, French, 1568. The author, Sir Robert Brooke, was Chief-Justice of the Common Pleas in 2 Ph. & Ma. Like Fitzherbert's work, on which it is principally founded, it consists of a digest of the year-books. It comes down to Elizabeth.

Rolle's *Abridgment of Cases and Resolutions of the Law*, temp. Chas. ii.—Published, with a preface by Sir Matthew Hale, in 1668. Rolle was Chief-Justice of England under the Commonwealth.

Viner's *Abridgment: a General and Complete Abridgment of Law and Equity*, in 24 vols. fol.; published from 1741–1751.

Comyn's *Digest of the Laws of England*, in 5 vols. folio.—Sir John Comyn was Chief Baron of the Exchequer, and died in 1740. His Digest was not published till after his death—the first volume being published in 1762. It is universally recognised to be the best and most authoritative of all works of the kind. Mr. Hargrave, in his notes to Co. Litt. (17a n (1)), says: "The whole of this work is equally remarkable for its great variety of matter, its compendious and accurate expression, and the excellence of its methodical distribution." A fifth edition by Hammond was published in 1822.

Bacon's *New Abridgment*.—The first volume of the first edition appeared in 1736. It is supposed by Sir William Blackstone to have been compiled chiefly from materials collected by Lord Chief-Baron Gilbert.

Cruise's *Digest of the Laws of England respecting Real Property*, in 7 vols., 1804–7.

Among compilations of a similar kind, but of little note, are:—

D'Anver's *General Abridgment of the Common Law*, 2 vols., 2nd ed., 1725.—It is practically a translation of Rolle's.

Nelson's *Abridgment of the Common Law*, 3 vols., 1725.

Petersdorff's *Abridgment of the Common Law*, 15 vols., 1st ed., 1825.

From early times there have been a number of Abridgments of the Statute Law.

The earliest, so far as is known, is one printed by Lettou & Machlinia in French, down to 31 Hen. vi. It is probably the earliest printed law book, except Littleton's *Tenures*.

The first English Abridgment of the Statutes was printed in 1519 (11 Henry VIII.), by John Rastall.

For a complete account of the various works of this kind, see Bridgman's *Legal Bibliography*, p. 328, and Marvin's *Bibliography*.

Apart from these so-called abridgments or digests, we have, in the nature of institutional writings, a series of historic treatises, which aim at presenting more or less a statement of the whole law. The most celebrated need alone be here referred to:—

Glanville's *Tractatus de Legibus Angliæ*, composed in the reign of Henry II., is one of the oldest, and, although now obsolete for practical purposes, is of antiquarian importance.

Henry III.'s reign produced Bracton, *De legibus et consuetudinibus Angliæ*, a systematic and complete view of the law in all its titles as it stood at the time it was written (Reeve, *Hist. Eng. Law*, i. 529, Finlayson's ed.). "Bracton's book is the crown and flower of English mediæval jurisprudence" (Pollock and Maitland, *Hist. Eng. Law*, i. p. 185). The main part of the book seems to have been written between 1250 and 1258.

The works known as *Fleta* and *Britton* appeared about 1290, Edward I. *Fleta seu Commentarius juris Anglicani* purports to be a treatise upon the whole law based upon Bracton. *Britton* is a small work in French.

To the reign of Edward II. is usually attributed the *Mirror of Justice*. It deals with all branches of the law, civil and criminal.

In the reign of Henry VI. appeared Sir John Fortescue's treatise, *De laudibus Legum Angliæ*. It is in the form of a dialogue between him and the young prince.

In the reign of Henry VIII. there appeared Perkins' treatise of the laws of England, pronounced a good authority by Lord Mansfield; and the *Dialogue between a Doctor of Divinity and a Student in Law*, written by St. Germain. A 17th ed. was published in 1787. It is also considered a good authority.

For the rest it will suffice here to mention Staundforde, who wrote on the *Pleas of the Crown* in French, under Ph. & Ma.; Lord Bacon, who published *Elements of the Common Law*; and Lord Coke's celebrated *Institutes*, temp. James I.

Of the older Law Dictionaries the best known are:—

Spelman's *Glossary*, 1626; Cowell's *Law Dictionary; or the Interpreter of Words and Terms used either in the Common or Statute Law and in the Tenures*, 1st ed., temp. James I.; Blount, *Law Dict.*, 1670; Burn, *Law Dict.*, 2 vols., 1792; Jacob, *Law Dict.*, 1729; Tomlin, *Law Dict.*

Abroad (Assets).—See ASSET.

Abroad, Bankruptcy Proceedings.—See BANKRUPTCY.

Abroad, Citation, etc., Service of.—See DIVORCE.

Abroad, Marriages.—Marriages of British subjects abroad are valid in point of form—

(a) If the marriage is celebrated in accordance with the local form

(*Brook v. Brook*, 1861, 9 H. L. C. 193; *Sottomayor v. De Barros*, 1877, 3 P. D. 1; 1879, 5 P. D. 94).

(b) All marriages between parties of whom one at least is a British subject, solemnised in the manner provided by the Foreign Marriage Act, 1892, 55 & 56 Vict. c. 239 (*q.v.*), by or in the presence of a "marriage officer," as therein defined (ss. 11, 12), *e.g.* a British ambassador, British consul, governor, or high commissioner, duly authorised to act as such.

(c) In the case of marriages solemnised within the British lines by any chaplain, or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad (s. 22, Foreign Marriage Act, 1892).

(d) If both parties enjoy the privilege of ex-territoriality (*q.v.*), and the marriage is solemnised in accordance with the forms recognised by their own law—*e.g.* marriages at the mansion of an ambassador, on board ship, or at foreign factories in the East.

(e) If solemnised in accordance with the requirements of their own law, in places where the use of the local form is impossible (Westlake, *Private International Law*, 3rd ed., p. 61; Dicey, *Conflict of Laws*, 626; *Cruise on Dignities*, 276; *Lautour v. Tesdale*, 1816, 8 Trian. 830; 17 R. R. 518; *Ruding v. Smith*, 1821, 2 Hag. Con. 371).

Abroad, Offences committed.—By the common law no offence committed outside the body of the realm was triable *in pais*. The rules as to venue (*q.v.*) made all common law offences local. Offences within the jurisdiction of the Admiralty were triable under the civil law; and the now obsolete Court of Constable and Marshal had jurisdiction to try certain offences on land abroad (see Ph. & 2 Ma. c. 10, s. 6; *Lord Rea's Case*, 1631, 3 St. Tri. 483).

1. As to offences committed on the sea or on British ship, see *R. v. Keyn*, 1876, 2 Ex. D. 63; the Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict. c. 73; and ADMIRALTY.

2. The Courts of England have also jurisdiction to try offences committed outside England, in the following cases:—(1) Treason, misprision of treason or concealment of treason outside the United Kingdom, by a British subject (35 Hen. VIII. c. 2, s. 1; 5 & 6 Edw. VI. c. 11), and treason felony wherever committed (11 & 12 Vict. c. 12, s. 3). (2) Offences by a British subject against the Explosives Act, 1883, committed outside the Queen's dominions (45 & 46 Vict. c. 3). See EXPLOSIVES. (3) Offences against the Foreign Enlistment Act, 1870, committed in any part of Her Majesty's dominions (33 & 34 Vict. c. 90 s. 16; *R. v. Jameson* [1896], 12 T. L. R. 551; *R. v. Sandoval*, 1887, 16 Cox C. C. 206). See FOREIGN ENLISTMENT. (4) Offences against the Official Secrets Act, 1889, in any part of the Queen's dominions, or by British officers or subjects elsewhere (52 & 53 Vict. c. 52, s. 6). See OFFICIAL SECRETS. (5) Misdemeanours by British officials in British possessions abroad (11 Will. III. c. 12; 10 Geo. III. c. 47, s. 4; 42 Geo. III. c. 85; *R. v. Shawe*, 1816, 5 M. & S. 403). (6) Murder or manslaughter on land outside the United Kingdom by a British subject, or being accessory (*q.v.*) thereto (24 & 25 Vict. c. 100, s. 9; *R. v. Bernard*, 1858, 1 F. & F. 240). (7) Offences committed by (?) European British subjects in India (13 Geo. III. c. 63, s. 39; 25 Geo. III. c. 37). (8) Offences against the Dockyards, etc., Protection Act, 1772 (12 Geo. III. c. 24); the Incitement to Mutiny Act, 1797 (37 Geo. III. c. 70); the Unlawful Oaths Acts, 1797 (37 Geo. III. c. 123, s. 6), and 1812 (52 Geo. III. c. 104). (9) Offences against the Slave Trade Acts (5

Geo. IV. c. 114, s. 9). See SLAVE TRADE. (10) Bigamy by a British subject in any part of the world (24 & 25 Vict. c. 100, s. 57). See BIGAMY; and see *Macleod's Case* [1891], App. Cas. 455; *Lemesurier v. Lemesurier* [1895], App. Cas. 517. (11) Perjury and forgery, punishable under the Commissioners of Oaths Act, 1889, committed within or without the Queen's dominions (52 & 53 Vict. c. 10 s. 9).

The venue and Court for the trial of these offences is in each case specified by the statute authorising the trial.

Abroad, Parties, etc., resident.—See COMMISSION, EVIDENCE ON.

Abroad, Property situate.—See BANKRUPTCY.

Abroad, Service.—See SERVICE OUT OF THE JURISDICTION.

Abroad, Wills made, Probate of.—See PROBATE; WILLS, FOREIGN.

Absconding Debtor.—See BANKRUPTCY.

Absconding Trustee.—See TRUSTS.

Absence beyond Seas.—Under the common law, "beyond the seas" meant out of the realm or power of the King of England, as to his crown of England (*Lane v. Bennett*, 1836, 1 Mee. & W. 70).

In the construction of the Statutes of Limitation of 21 Jac. I. c. 16, and 4 Anne, c. 16, the expression has been construed to mean out of Great Britain (*King v. Walker*, 1761, 1 Black. W. 287). So that, while Scotland was held not to be beyond seas, Ireland, on the other hand, was held to be beyond the seas (*Lane v. Bennett*, *supra*).

The Statutes of Limitation—21 Jac. I., relating to personal actions on simple contract and tort; 3 & 4 Will. IV. c. 27, to real property; and 3 & 4 Will. IV. c. 42, to actions on specialties—provided that absence beyond seas should be one of the grounds of a plaintiff's disability prolonging the various periods prescribed for bringing actions in accordance with those various Statutes.

The Statute 4 Anne, c. 16, provided for the case of the absence beyond seas of a defendant, which had been held not to fall within the Statute of James I. Sec. 19 enacted that, in actions governed by the latter Statute, or for the recovery of seamen's wages under the then enacted Act, if the defendant or defendants should, at the time of such action accrued, be fallen or come beyond the seas, then such action might be brought after the return of the defendant or defendants, within such times as are limited by the Act of James I.

Similarly, sec. 4 of 3 & 4 Will. IV. c. 42, provides for bringing actions against persons who return from beyond seas. Sec. 7 also enacts that, in

regard to such actions on specialties and actions governed by the Act of James I., "beyond the seas" shall mean beyond the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and any islands adjacent to any of them being part of the dominions of the Crown. This definition is extended to the Statute of 4 Anne, c. 16, by sec. 12 of the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97.

Under the Real Property Limitation Acts, the absence of the defendant beyond seas does not extend the time allowed by those Acts for taking proceedings.

In the case of plaintiffs, absence beyond seas no longer exists as a disability under any of the above Statutes, for by sec. 10 of the Mercantile Law Amendment Act, 1856, whether one or more of the persons entitled to sue are absent, the period of limitation is not on that account extended.

Where there are two or more joint debtors, one or more of whom are beyond seas at the time the cause of action accrued, judgment obtained against the other co-debtors does not, of itself, discharge the joint debtor or debtors beyond the seas from being sued on his or their return,—an exception to the ordinary rule (*Kendall v. Hamilton*, 1879, 4 App. Cas. 504). But the person entitled to the action has no additional time for the absence beyond seas, as against the co-debtors not so absent (Mercantile Law Amendment Act, 1856, s. 11).

Quære, Whether this section includes any cause of action but actual debt (Darby and Bosanquet, *Statutes of Limitation*, p. 61).

Time begins to run if the defendant returns for ever so short a time, even without the plaintiff's knowledge (*Gregory v. Hurrill*, 1826, 5 Barn. & Cress. 341).

The rules of limitation being rules of procedure, Englishmen and foreigners are on the same footing; even if the foreigner has never been in this country (*Strithorst v. Graeme*, 1770, 2 Black. W. 723; and *Lafond v. Ruddock*, 1853, 13 C. B. 813).

If the cause of action has arisen abroad and the defendant remains beyond seas, and then either arrives here for the first time, or returns after the period of limitation, the plaintiff has the additional time for suing, if the right itself is not extinguished (*Williams v. Jones*, 1811, 13 East, 439; 12 R. R. 401).

The plaintiff must specially reply the absence of defendant.

See LIMITATION; PRESCRIPTION.

Absence for Seven Years.—See BIGAMY.

Absence of Accused.—1. In prosecutions for treason and felony the accused must be present throughout all the proceedings, both on the preliminary inquiry (11 & 12 Vict. c. 42, s. 17) and at the trial of the indictment, when he is given in charge to the jury, and up to judgment. If he falls ill, the jury must be discharged and a new trial ordered (*R. v. Stevenson*, 1791, Leach, 2nd ed., 443). In his absence the trial cannot proceed; but the process of outlawry may be resorted to. See OUTLAWRY.

2. In the case of an indictable misdemeanour the accused must be present at the preliminary inquiry (11 & 12 Vict. c. 42, s. 17), but his presence is not absolutely necessary for the validity of the trial, nor is he

given in charge to the jury (3 Co. Inst. 110; Arch. Cr. Pl., 21st ed., 186). But he must be present when judgment is given, unless process in outlawry has been unsuccessfully taken (*R. v. Chichester*, 1851, 17 Q. B. 504*n*).

3. On application for a new trial in a criminal case, the defendant, if not in custody, and liable to more than a fine, must be present, unless the Court otherwise orders (*R. v. Caudwell*, 1851, 17 Q. B. 503; Crown Office Rules, 1886, r. 169), and a like rule applies in the case of a writ of error (*Murray v. R.*, 1845, 7 Q. B. 700; *Howard v. R.*, 1865, 10 Cox C. C. 54; Crown Office Rules, 1886, rr. 187–191; Short and Mellor, *Crown Office Practice*, 252, 320–326).

4. If a defendant does not appear personally, or by counsel or solicitor (*Bessell v. Wilson*, 1853, 22 L. J. M. C. 94), to a summons duly served on him for an offence punishable on summary conviction, a Petty Sessional Court may proceed *ex parte* on the information, and adjudicate as fully as if the defendant had personally appeared (11 & 12 Vict. c. 43, s. 2). In practice it is inexpedient to pursue this course (*R. v. Smith*, 1866, L. R. 10 Q. B. 608), and it is not followed except in proceedings before justices on complaint for matters in the nature of civil debts.

Absence without Leave (Offence of).—See SHIPPING.

Absent Parties.—Before the Judicature Act, 1873, the non-joinder of persons who ought to have been parties, whether as plaintiffs or defendants, was taken advantage of in the Common Law Courts by plea of abatement (see ABATEMENT, PLEAS IN), or demurrer (*q.v.*) for want of parties, both of which proceedings are now abolished (see R. S. C., 1883, Order 21, r. 20; Order 25, r. 1; Chit. Arch., 1885, p. 1019).

In the Court of Chancery the desire to do complete justice to all parties interested in the questions before the Court, and to finally settle all their rights, led it to require, as a general rule, that all persons materially interested in the subject-matter of the suit should be parties, either as plaintiffs or defendants. This rule was found to cause great difficulty, delay, and expense, and it has been gradually modified and altered so as to suit the exigencies of modern practice. This was brought about partly by the action of the Court itself, as, for instance, in the case of suits by numerous parties, where the Court, before the Judicature Act, relaxed its practice so as to permit a plaintiff to sue and a defendant to be sued on behalf of himself and others (*Bromley v. Williams*, 1863, 32 Beav. p. 188) by statute, as by the Chancery Procedure Act, 1852, s. 51, which provided for the making of a decree in the presence of some of the parties interested; and by the Consolidated Orders, such, for instance, as Consolidated Order 23, r. 11, which enabled the Court to make a decree saving the rights of absent parties. This Statute and the Consolidated Orders have been repealed, and the practice is now governed by the R. S. C., 1883, as amended by subsequent rules, and as to partition actions by the Partition Acts, 1868 and 1876.

Misjoinder or non-joinder of parties can no longer defeat a cause or matter (Order 16, r. 11), and the Court may deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it (*ibid.*), and may at any stage of the proceedings order parties, who ought to have been joined, or whose presence it may deem necessary, in order to enable it to adjudicate effectually and completely upon all questions before it, to be added (*ibid.*, and see Order 16, r. 2).

When there are numerous persons having the same beneficial proprietary right (*Temperton v. Russell* [1893], 1 Q. B. 438), one or more of such persons may be authorised to sue or be sued, or to defend on behalf of others (Order 16, r. 9). So, in actions for waste, or otherwise for the protection of property, one person may sue on behalf of himself and others (Order 16, r. 37). Trustees and personal representatives may also sue and be sued, as representing the property of which they are such trustees, etc., without joining those beneficially entitled thereto (Order 16, r. 8). And in proceedings concerning a trust, non-assenting or absent persons may be bound by a compromise of the proceedings entered into by those persons who are before the Court, if the Court thinks it beneficial for them so to be bound (Order 16, r. 9 (a); *Collingham v. Sloper* [1894], 3 Ch. 716).

The above rules are common to all the divisions of the High Court and to the Court of Appeal, but the following relate only to certain proceedings assigned to the Chancery Division, namely, administrations and trusts. In any case in which the right of an heir, customary heir, next of kin, or a class, depends upon the construction of an instrument, or in any other case in which such persons or any of them are interested, an order may be made appointing a representative of such persons or class, if it is thought expedient so to do, in order to save expense or for some other reason, and the judgment of the Court made in the presence of the representative will bind the person or class so represented (Order 16, rr. 32a and b). So also, where in any cause, matter, or other proceeding relating to administration or trusts, it appears to the Court or judge that any deceased person, who was interested in the matter in question, has no legal personal representative, the Court or a judge may either proceed in the absence of such representative, or appoint one; and the order so made, and any order consequent thereon, will bind the estate so represented (Order 16, r. 46). A judgment or order for the administration of a trust estate may be obtained by one of the parties interested, without serving other persons interested (Order 16, rr. 3-6; and see Order 55, rr. 3-6), and by executors or trustees against one of the persons interested, without serving the others (Order 16, r. 38; and see Order 55, rr. 3-6 and *In re Richerson, infra*). Where a judgment or order has been made affecting the rights of persons *not parties* to the action, the Court or a judge may direct that any persons interested may be served with notice of such judgment or order, and after such service such persons will be bound by the proceedings as if they had been parties thereto, and may, within a month after such service, appeal therefrom (Order 16, r. 40), and may attend the proceedings upon entering an appearance (Order 16, r. 42, and see further, rr. 41, 43, 44). In certain cases, however, the judge may dispense with service of the judgment or order, or order substituted service thereof, or notice by advertisement, and he may also order that the persons as to whom service is dispensed with shall be bound as if served (Order 55, rr. 35, 35a; and as to partition actions, see the Partition Act, 1876, ss. 3 and 4). If, however, service is dispensed with in a partition action, upon a person having a beneficial interest, the notices required by the Partition Act, 1876, ss. 4 and 3, must be issued (*Phillips v. Andrews*, 1887, 56 L. T. 108); but if such person has no beneficial interest, *secus* (*Crossman v. Richards*, W. N. 88, 167). It is important to understand how the interests of persons affected by an account, or inquiry directed in an administration action, to which they are not parties, may be bound, and the following points are clear:—

If such persons in actions under Order 16, rr. 33 to 38, are served with notice under Order 16, r. 40, they are bound (*May v. Newton*, 1887, 34 Ch. D.

p. 349). The direction of the judge under this rule should therefore be obtained in such cases (*ibid.*). If service of the judgment or order is dispensed with under Order 55, rr. 35, 35*a*, the persons as to whom service is so dispensed with are bound as if served (see the rules). Where a person is sued on behalf of a numerous class (Order 16, r. 9), an order should be obtained appointing him to represent such class, in which case absent parties will be bound. In the case of a person suing on behalf of such a class, such an order may not be necessary, but directions for service under Order 16, r. 40, should be obtained (*May v. Newton, supra*). If the Court proceeds in the absence of a representative, under rule 46 of Order 16, the order, to render it binding on the estate of a deceased person, should show on the face of it that the attention of the judge was called to the point, and that he decided so to proceed. If he appoints under the rule, a like course should be taken (*In re Richerson* [1893], 3 Ch. 150, and compare with remarks of Kay, J., in *May v. Newton*, 1887, 34 Ch. D. 350). As to originating summonses, under Order 55, rr. 3 and 6, the Court is not bound to have before it all persons whose interests may be affected, and where the Court does not require other persons to be served (see Order 55, r. 6), there is no necessity to express this on the face of the order, as in r. 46 of Order 16 (*In re Richerson, supra*).

Absents.—See BANKRUPTCY.

Absolute Bills of Sale.—See BILLS OF SALE.

Absolute Power.—See CROWN.

Absolute Privilege.—On certain occasions the interests of society require that a man should speak out his mind fully and frankly, without thought or fear of consequences. To such occasions, therefore, the law attaches an absolute privilege; and any action in respect of words so published is forbidden, even though it be alleged that they were spoken falsely, knowingly, and with express malice. This absolute privilege is confined to cases in which the public service or the administration of justice requires that complete immunity should be afforded. There are not many such cases, nor is it desirable that there should be many. The Courts will not extend the number (*Stevens v. Sampson*, 1880, 5 Ex. D. 53). As Lopes, L. J., says, in *Royal Aquarium v. Parkinson* [1892], 1 Q. B., at p. 451: "The authorities establish beyond all question that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceedings before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed. This 'absolute privilege' has been conceded on the grounds of public policy, to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who, from their high character, are not likely to abuse the privilege, and who have the power, and ought to

have the will, to check any abuse of it by those who appear before them. It is, however, a privilege which ought not to be extended. It belongs, in my opinion, to Courts recognised by law, and to such Courts only."

Occasions absolutely privileged may be grouped under three heads:—
I. *Parliamentary Proceedings*; II. *Judicial Proceedings*; III. *Acts of State, etc.*

I. *Parliamentary Proceedings*.—It is specially enacted by the Bill of Rights (*q.v.*), 1 Will. & Mary, St. 2, c. 2, that "the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any Court or place out of Parliament." Hence no action lies against a member of either House of Parliament for any words spoken in the House (*Dillon v. Balfour*, 1887, 20 L. R. Ir. 600). No indictment will lie for an alleged conspiracy by members of either House to make speeches defamatory of the plaintiff (*Ex parte Wason*, 1869, L. R. 4 Q. B. 573). A petition to Parliament, or to a committee of either House, is absolutely privileged, although it contain false and defamatory statements. So is all evidence given before a committee of either House (*Goffin v. Donnelly*, 1881, 6 Q. B. D. 307). But a publication of such petition or evidence to others not members of the House is not privileged, except in the case of parliamentary papers published by the authority of either House, which are protected by a special statute, the 3 & 4 Vict. c. 9.

II. *Judicial Proceedings*.—Public policy requires that a judge on the bench, when dealing with the facts before him, that a party preferring or resisting a legal proceeding, and that a witness who gives evidence orally or in writing in a Court of justice, shall do so with his tongue unfettered and his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. A judge of a superior Court has an absolute immunity, and no action can be maintained against him, even though it be alleged that he spoke maliciously, knowing his words to be false, and also that his words were irrelevant to the matter in issue before him, and wholly unwarranted by the evidence (*Floyd v. Barker*, 1608, 12 R. 24; *Taafe v. Downes*, 1813, 3 Moo. P. C. C. 36, *n.*; *Fray v. Blackburn*, 1863, 3 B. & S. 576; *Anderson v. Gorrie* [1895], 1 Q. B. 668). The judge of an inferior Court of record enjoys the same immunity, provided he has jurisdiction over the matter before him (*Scott v. Stansfield*, 1868, L. R. 3 Ex. 220); though for any act done in any proceeding in which he either knows, or ought to know, that he is without jurisdiction, he is liable as an ordinary subject (*Houlden v. Smith*, 1850, 14 Q. B. 841; *Calder v. Halket*, 1839, 3 Moo. P. C. 28). No action will lie against a justice of the peace for defamatory words spoken by him on the bench in relation to any matter properly before him, even though the plaintiff asserts that such words were spoken maliciously and without reasonable or probable cause. A similar immunity is enjoyed by counsel (*Munster v. Lamb*, 1883, 11 Q. B. D. 588), by an attorney acting as an advocate in a County Court or a Police Court (*Mackay v. Ford*, 1860, 5 H. & N. 792), and by a proctor in an Ecclesiastical Court (*Higginson v. Flaherty*, 1854, 4 Ir. R. C. L. 125). See ADVOCATE. The party himself, because of his ignorance of the proper mode of conducting a case, is allowed even greater latitude.

Any statement made by a witness in the box is absolutely privileged, so long as it has any reference to the matters in issue in the action, or fairly arises out of any question asked him by counsel on either side (*Seaman v. Netherclift*, 1876, 1 C. P. D. 540; 2 C. P. D. 53). So, too, all documents necessary to the conduct of the litigation, such as writs, pleadings, and affidavits, are absolutely privileged, provided the proceeding is before a

Court of competent jurisdiction (*Buckley v. Wood*, 1591, 4 R. 14 b.; Cr. Eliz. 230; *Kennedy v. Hilliard*, 1859, 10 Ir. C. L. R. 195; 1 L. T. 78). But an affidavit made voluntarily when no cause is pending, or made *coram non judice*, is not privileged at all (*Maloney v. Bartley*, 1812, 3 Camp. 210).

In all these cases, no absolute privilege arises, unless there be a judicial proceeding pending before a competent Court; and the words must be "spoken in office" (per Lord Mansfield in *R. v. Skinner*, 1772, Lofft, at p. 56), that is, in the discharge of the speaker's duty before that Court. A County Council is not a Court for this purpose (*Royal Aquarium, etc. Society v. Parkinson* [1892], 1 Q. B. 431), nor the General Medical Council (*Allbutt v. General Medical Council*, 1889, 23 Q. B. D. 400). But the Discipline Committee of the Incorporated Law Society is a Court within the rule (*Lilley v. Roney* [1892], 61 L. J. Q. B. 727).

III. *Acts of State, etc.*—Every official statement made, and every official letter written, by an officer of the State in the course of the performance of his official duty is absolutely privileged (see ACT OF STATE). "It is not competent to a civil Court to entertain a suit in respect of the action of an official of State in making such a communication to another official in the course of his official duty, or to inquire whether or not he acted maliciously in making it" (*Chatterton v. Secretary of State for India* [1895], 1 Q. B. 191). A similarly absolute privilege extends to all acts of State and to the official notification thereof in the *London Gazette*, to all State papers, and to all advice given to the Crown by its ministers (*Oliver v. Lord William Bentinck*, 1811, 3 Taun. 456; *Grant v. Secretary of State for India*, 1877, 2 C. P. D. 445; *Doss v. Secretary of State for India*, 1875, L. R. 19 Eq. 509). All reports made by a military or naval officer to his superior officer in the course of his duty, all evidence given by any witness called at a court-martial or other military or naval court of inquiry,—in short, all acts done in the honest exercise of military or naval authority, are absolutely privileged; for it is essential to the welfare and safety of the State that the discipline of the service should be maintained without any interference by civil tribunals (*Home v. Bentinck*, 1820, 2 Brod. & B. 130; 22 R. R. 662, 748; *Dawkins v. Lord Rokeby*, 1875, L. R. 7 (H. L.) 744; *Dawkins v. Lord Paulet*, 1869, L. R. 5 Q. B. 94). But private letters written by the commanding officer of a regiment to his immediate superior on military matters, as distinct from his official reports, are not absolutely privileged; the judge should leave the question of malice to the jury, if there be any evidence to go to them on that issue, as in an ordinary case of qualified privilege (*Dickson v. Earl of Wilton*, 1859, 1 F. & F. 419; *Dickson v. Combermere*, 1863, 3 F. & F. 527).

Absolutely entitled.—This expression is used in Lands Clauses Consolidation Act, 1845, s. 69; Leases and Sales of Settled Estates Act, 1856, s. 23 (repealed), which Act was applied to the Partition Act, 1868, by s. 8 of that Act; the Settled Estates Act, 1877, s. 34; Settled Land Act, 1882, s. 21 (ix.), which adds "or entitled to give an absolute discharge"; the Trustee Act, 1850, ss. 23, 24 (repealed); and the Trustee Act, 1893, s. 35 (1). Secs. 2 (8) and 39 of the Settled Land Act, 1892, and the Settled Land Act, 1890, s. 14, must also be considered.

Leading cases under the Lands Clauses Act and the Settled Land Act, are: *In re Smith*, 1889, 40 Ch. D. 356; and *Wootton's Estate*, 1890, W. N., 158; *Charity Trustees, Spurstowe's Charity*, 1874, L. R. 18 Eq., 179; *Ex parte Norfolk Clergy*, 1882, W. N. 53 R. Under the Trustee Acts, the expression

included new trustees, but not a sole trustee, or a tenant for life unless only applying for dividends.

Abstract of Indictment.—It is well established practice for the Clerk of the Court or the prosecutor to prepare and file an abstract of every indictment presented at any sessions, for the use of the judge.

Abstract of Title.—A concise statement of the instruments and events under and by means of which a person derives his title to property. It is usually prepared by the owner's solicitor on the occasion of a sale or mortgage of land, and delivered to the purchaser's or mortgagee's solicitor, for the purpose of enabling him to judge whether the title is satisfactory.

The right to an abstract of title is implied in every contract for the sale of land, unless excluded by express stipulation (see Sugden, *Vendors and Purchasers*, 14th ed., 406), so that, if an abstract is not delivered within a reasonable time, the purchaser may rescind (see *Compton v. Bagley* [1892], 1 Ch. 313); and, in the case of an intended mortgage, it is the practice to require an abstract, just as in the case of a sale under an open contract.

The duty falls on the solicitor preparing the abstract, of carefully perusing all the deeds, wills, and other instruments relating to the title to be shown, and of setting out their material parts in the abstract. Recitals of deeds and wills which are abstracted in chief need only be referred to, but all recitals of instruments which are not abstracted in chief, and all recitals of material facts, should be set out fully, and the exact words of grant, limitation, or devise, and of any powers which have been exercised, should be given in every case. The parcels in each deed should, so far as they relate to the property, be copied *verbatim*, except where the description is the same as in a previously abstracted deed, in which case a statement that they are the premises so described is sufficient. Tracings of all plans on the deeds should also accompany the abstract for the purpose of identifying the property. Abstracts are often imperfectly prepared in this respect, but it is conceived that a vendor is as much bound to furnish a tracing of a plan on a deed as he is to set out the description of the parcels in the operative part (see *Brown v. Wales*, 1872, L. R. 15 Eq. 142). The instruments should be abstracted in chronological order, except in the case of a will, which should be placed immediately before the date of the testator's death; while statements of marriages, births, deaths, heirships, and other facts on which the title depends, should be inserted in their proper places in order of time. A perfect abstract will thus give a complete history of the title from the time fixed for its commencement up to the date of its delivery, showing not only the vendor's interest in the property, but also any incumbrances or other interests to which it may be subject.

A solicitor who fraudulently conceals any material instrument or any incumbrance, or falsifies any pedigree, to induce a purchaser or mortgagee to accept the title, is guilty of a misdemeanour, besides being liable to an action for damages (22 & 23 Vict. c. 35, s. 24; 23 & 24 Vict. c. 38, s. 8). The question has, however, been raised, whether it is proper to abstract instruments creating merely equitable interests, which, if undisclosed, would not affect the purchaser's title. In the case of an instrument merely relating to the beneficial interest in a mortgage debt, which is not noticed in

the mortgage, it seems undesirable to abstract it; the general practice being to keep notice of the trust off the title. So, in the case of a separate declaration of trust by a person to whom the property has been conveyed as absolute owner, it is unnecessary to abstract it, if not referred to in the conveyance, unless the trustee has died or become bankrupt; but in either of these cases the title cannot be properly traced without disclosing the trust. Equitable charges stand on a distinct footing, as it is seldom intended to allow the borrower's power of disposition to remain intact; moreover, where there has been a prior mortgage to a building society, which has been discharged by a statutory receipt since the date of the charge, it may have become clothed with the legal estate; or if the charge is within s. 11 of the Act, 23 & 24 Vict. c. 145, the holder may be able to pass the legal estate by exercising his power of sale. It has been laid down that an equitable charge ought to be disclosed, even though it has been paid off (see *Drummond v. Tracy*, 1860, John. 608); and it is conceived that the proper course is to abstract such charges, whether subsisting or not. Perhaps the one exception which may be safely made to this rule, is in the case of an informal charge given by the vendor to his solicitor to secure an advance which is intended to be paid off out of the purchase-money on completion (see Dart, *Vendors and Purchasers*, 6th ed., 343).

A practice appears to have sprung up of not abstracting in chief, wills which are recited in later deeds. This is objectionable where other parts of the recited will affect the construction, and in any case the practice is inconvenient and should not be followed, as a purchaser is entitled to have every instrument through which the title is traced abstracted in chief, whether the original is or is not in the vendor's possession (see *In re Johnson and Tustin*, 1885, 30 Ch. D. 42); although in the case of a simple devise, fully abstracted by way of recital, the abstract would probably be held to be sufficient (see *In re Ebsworth and Tidy*, 1889, 42 Ch. D. 23). No abstract is required of expired leases, but leases which have been determined by surrender or by proceedings in ejectment should be abstracted, together with the surrender or the pleadings and judgment in the action.

It is the duty of the solicitor acting for the purchaser or mortgagee, to examine the abstract with the original deeds, probates of wills, and office copies of instruments of record, and to set out any material clauses which have been omitted from the abstract, correct any mistakes, and mark the stamps in the margin. He should notice by whom each deed is executed, and if by only some of the parties should insert their names in the footnote; if any party has executed by attorney, it should be so stated, and the reference to the power set out; and any want of a seal should also be recorded. In the case of appointments under powers he should note the number of attesting witnesses, and in the case of wills should set out their names. Interlineations and alterations should be noted in the margin of the abstract; and generally it should be seen that nothing affecting the title is omitted. For the efficient performance of this duty, the person examining the abstract should not only have made himself acquainted with the title, but should also be competent to judge of the materiality of every clause in the various instruments; hence, if the examination is left to a clerk not possessing the requisite knowledge and experience, a serious risk is incurred, not only by the client, but also by the solicitor, who is liable for any damage sustained by his negligence in investigating the title (see *Whiteman v. Hawkins*, 1878, 4 C. P. D. 13).

The expense of production of any deeds not in the vendor's possession

is thrown on the purchaser by s. 3 of the Conveyancing Act, 1881, even where they are in the possession of a mortgagee (see *In re Willett and Argenti*, 1889, 60 L. T. 735).

Except in cases where the property is of small value, the abstract is usually laid before counsel to advise on the title; and although this is sometimes deferred until after the abstract has been examined, it is believed that counsel's opinion is more commonly taken before the examination; a course which probably saves time and expense by rendering a re-examination of the abstract unnecessary, though it may necessitate a further opinion as to the effect of any alterations made or fresh matter introduced on examination.

In advising on title, it makes but little difference whether a sale or mortgage is contemplated, as practically the same considerations apply in both cases; a mortgagee usually requiring such a title as could be forced on a purchaser under an open contract. In the following remarks, it has therefore been thought sufficient to deal with the case of an abstract delivered on the occasion of a sale.

The duty of the purchaser's counsel in perusing the abstract is to see that it commences with a good root of title of sufficient age, and that the subsequent title is deduced without any break, and shows that the vendor has power to convey the property purchased for the estate mentioned in the contract. If this appears by the abstract, he has next to see that all the abstracted instruments and facts are duly verified; but the mere existence of some defect in the evidence will not render the title unsatisfactory, provided it is not serious enough to throw doubt on the right to hold the property.

In the absence of any stipulation limiting the purchaser's rights, the title to freeholds should commence with an instrument dated at least forty years before the contract (see Vendor and Purchaser Act, 1874, s. 1). Enfranchised copyholds form an exception to the rule, the purchaser being precluded by Statute from calling for the title to make the enfranchisement (see Conveyancing Act, 1881, s. 3); but he is entitled to have the copyhold title shown for the full period. A conveyance on sale or a legal mortgage in fee is a good root of title; and a voluntary settlement, appointment, or disentailing deed would seem to be sufficient, if of the requisite age (see 1 Preston, *Abstracts*, 2nd ed., 7); though probably none of these instruments, if less than forty years old, would be made a good root of title by a condition which did not disclose its nature (see *In re Marsh and Granville*, 1883, 24 Ch. D. 11). A general devise in a will is insufficient as a root of title without evidence of the testator's seisin (*Parr v. Lovegrove*, 1857, 4 Drew, 170); but a specific devise seems to be sufficient (see 1 Preston, *Abstracts*, 17).

In the case of leaseholds, the title should commence with the lease, even though more than forty years old, as this was an exception to the old rule restricting the title to sixty years (see *Frend v. Buckley*, 1870, L. R. 5 Q. B. 213), and is therefore not affected by the Vendor and Purchaser Act, 1874; but a purchaser has no right to require the title between the lease and the last forty years to be shown (*Williams v. Spargo*, W. N., 1893, 100); nor can he require the title to the reversion, whether the lease be a head-lease or an under-lease (see Vendor and Purchaser Act, 1874, s. 2; Conveyancing Act, 1881, s. 3; *Gosling v. Woolf* [1893], 1 Q. B. 39).

After seeing that the root of title is satisfactory, it must next be considered whether the subsequent title is regularly deduced. For this purpose it is necessary to form an opinion as to the legal effect of every

instrument and fact forming a link in the chain of title; but before the legal effect of any instrument can be determined, the intention of the parties must be ascertained; a question of construction which depends on the whole instrument, whether it be a deed or will. And here the importance of the examination of the abstract appears; for the omission of a single sentence may result in a wrong conclusion being arrived at. In one case, where an advance on the security of a married woman's interest under a will was contemplated, an abstract of the devise was furnished, which omitted the clause restraining her from anticipation; the omission was not noticed by the solicitor's clerk who examined the abstract with the probate, and the mortgagees in consequence lost their security.

It is important to observe which of the parties have executed the various deeds; and for this purpose the names given at the commencement of each abstracted instrument cannot be relied on, but recourse must be had to the foot-note at the end; and if any granting party appears not to have executed it, the grant purporting to be made by him must be treated as a nullity. If any conveyance appears to be not under seal, it must not be treated as passing more than an equitable interest, notwithstanding a full attestation clause, testifying to its having been sealed and delivered (see *National Provincial Bank v. Jackson*, 1886, 33 Ch. D. 1). The fact of the grantee not executing the deed is immaterial; indeed, the grant may be valid though he be not named a party to the deed (see 8 & 9 Vict. c. 106, s. 5).

An abstract should be required of every recited instrument which appears to affect the property, except in the case of any prior to the root of title (see Conveyancing Act, 1881, s. 3); but where it cannot be gathered from the recital whether the instrument does or does not affect the property, although the question should be asked, an answer that it does not relate must be accepted (see *Patman v. Harland*, 1881, 17 Ch. D. 353). Evidence should also be required of any material facts disclosed by the recitals, unless prior to the root of title (see Conveyancing Act, 1881, s. 3), except in the case of recitals which are contained in a deed twenty years old (see Vendor and Purchaser Act, 1874, s. 2), or which merely relate to payment of the consideration (see 3 Preston, *Abstracts*, 16), or recitals introduced for the purpose of keeping notice of a trust off the title, e.g. a recital that the grantee is entitled in equity (see *In re Harman & Unbridge Railway Co.*, 1883, 24 Ch. D. 720).

It should also be observed whether the consideration purports to be paid to the persons entitled to receive it. If paid to trustees, it should be shown that they had power to give a receipt; or if paid under an order of Court, that the terms of the order have been followed. There should be seen to be an indorsed receipt for the consideration, unless its payment is recited, or sec. 55 of the Conveyancing Act, 1881, applies; and in the latter case the receipt in the body of the deed should be seen to be in proper form (see *Renner v. Tolley* [1893], 68 L. T. 815). If there is no consideration, inquiry should be made whether the grantor executed any subsequent conveyance for value before the Voluntary Conveyances Act, 1893, 56 & 57 Vict. c. 21, and search should be made against him in bankruptcy for the ten years following the deed. If ten years have not elapsed, it should be ascertained whether the grantor is still alive, as if so the grant is liable to be defeated by his becoming a bankrupt (see 46 & 47 Vict. c. 52, s. 47; *In re Briggs & Spicer* [1891], 2 Ch. 127; and consider *In re Brall* [1893], 2 Q. B. 381).

In determining the legal effect of any conveyance, it must also be considered whether the grantor had the estate he purported to convey; whether he was under any disability which would prevent him from passing it; and whether he had power to dispose of the beneficial interest. It sometimes happens that the grantor's name is altogether omitted in the operative part of a deed, a defect which prevents the estate passing unless the intention is clear (see *Dent v. Clayton*, 1864, 12 W. R. 903). But the omission of the grantee's name in the operative part is of no importance, provided the estate be limited to him in the habendum; so, its omission from the habendum is immaterial, if there is a valid grant to him in the operative part (see 3 Preston, *Abstracts*, 27, 39).

The capacity of the grantee to take must also be considered; and in this connection it must be remembered that freeholds could not be granted by a man to his wife, or by a wife to her husband, until the law was altered by sec. 50 of the Conveyancing Act, 1881; and that leaseholds could not be assigned by a man to his wife before the Married Women's Property Act, 1882, came into operation (see *Baddeley v. Baddeley*, 1878, 9 Ch. D. 113). So, it must be borne in mind that if a man assigned leaseholds to himself and others before the passing of the Law of Property Amendment Act, 1859, the whole estate vested in the others (see 22 & 23 Vict. c. 35, s. 21); while a similar grant of freeholds had a similar effect until the Conveyancing Act, 1881, came into operation (see s. 50). It must further be noticed whether any circumstances are disclosed making it inequitable for the grantee to acquire the estate, as in the case of a trustee for sale purchasing from his co-trustees, in which case a deed of confirmation from the beneficiaries should be required.

The next thing to be ascertained is that the property is comprised in each deed through which the title is traced; and for this purpose the plans on the deeds must be carefully examined. Where the plans do not show enough to identify the property, this may sometimes be done with the aid of the ordnance map. If there are no plans on the deeds, old leases and assessments to the poor-rate and land-tax may have to be resorted to for establishing the identity; but, in such cases, a statutory declaration by some person acquainted with the property, that it has been enjoyed, according to the title shown, for the last twelve years or more, is usually required. Any reservations or exceptions from the parcels must be considered, to see that they do not affect the property purchased.

The words of limitation must be carefully noticed, remembering that until the Conveyancing Act, 1881, came into operation, an estate of inheritance would not pass without the word "heirs," and that now a limitation to the grantee and his heirs, or "in fee-simple," is necessary to pass it (see s. 51), even though the estate be merely equitable (see *In re Whiston* [1894], 1 Ch. 661). In the case of leaseholds, it must be noticed whether the whole term is assigned or merely an under-lease created, bearing in mind that an under-lease for the whole term operates as an assignment (see *Beardman v. Wilson*, 1868, L. R. 4 C. P. 57). Where uses are declared, it must be considered whether they pass the legal estate under the Statute of Uses, or confer merely equitable interests (see *Cooper v. Kynock*, 1872, L. R. 7 Ch. 398); and where there are covenants for title, it must be observed whether any incumbrances are disclosed.

If the property is situate in Middlesex or Yorkshire, it must be noticed whether the foot-notes to the various deeds (including enfranchisement deeds; see *Reg. v. Middlesex Registrar*, 1888, 21, Q. B. D. 555) state that

they are registered in the local registry; and if not, this should be required to be done by the vendor at his own expense.

In every case the stamps marked in the margin of the abstract must be checked, and any insufficiently stamped deed should be required to be duly stamped at the vendor's expense (see *Whiting to Loomes*, 1881, 17 Ch. D. 10); and if there is a condition precluding objections as to stamps, it must be considered whether it is avoided by sec. 117 of the Stamp Act, 1891.

There are many other points which commonly arise on deeds and statutory assurances by reason of the position of the parties or the nature of the instrument. Of these, it will be sufficient to give the following instances:—

Administrator.—Where an assignment of leaseholds appears to have been made by an administrator, letters of administration, dated prior to the assignment, should be produced to show that he had power to assign; and if the assignment is not for value, or is given in discharge of his own private debt, the concurrence of the next-of-kin should be shown.

Appointment.—Any appointment under a power must be seen to be authorised by the power, for which purpose the instrument creating it should be abstracted and produced; and the appointment should also be ascertained to be attested, as prescribed by the power, or by two witnesses (see 22 & 23 Vict. c. 35, s. 12).

Attorney.—If a conveyance is executed by attorney, the power of attorney should be abstracted and produced, and shown to authorise the conveyance, and to be under seal; and the conveyance should be shown to be executed in the name of the principal, unless the case is within sec. 46 of the Conveyancing Act, 1881. If the principal is a trustee, it should be seen that the delegation of the trust is confined to execution of the deed and receipt of the purchase-money (see *In re Hetling & Merton* [1893], 3 Ch. 269). Evidence should also be given that the principal was alive when the power was exercised, and (unless the case is within sec. 8 or sec. 9 of the Conveyancing Act, 1882) that the power has not been revoked.

Bankruptcy Trustees.—If a conveyance appears to have been made by a trustee in bankruptcy, the order of adjudication should be abstracted and an office copy produced, as a mere receiving order does not divest the bankrupt's estate (see *Rhodes v. Dawson*, 1886, 16 Q. B. D. 548). An office copy of the certificate of the trustee's appointment should also be produced, as the appointment only takes effect from the date of the certificate (see Bankruptcy Act, 1883, s. 21). If the conveyance is in exercise of a power vested in the bankrupt, it should be shown that the bankrupt was alive at the date of the conveyance (see *Nichols v. Nixey*, 1885, 29 Ch. D. 1005).

Building Society.—Where a mortgage to the trustees of an unincorporated building society is vacated by their indorsed statutory receipt, it should be ascertained by inquiry at the office of the Registrar of Friendly Societies, that the society has been certified under the Building Societies Act, 1836, and not incorporated under the Building Societies Act, 1874. It should also be ascertained that the persons signing the receipt were the trustees for the time being (see 6 & 7 Will. IV. c. 32, s. 5). If they are not the same persons as the trustees to whom the mortgage was made, evidence of the death or removal of the old trustees and of the appointment of the new trustees should be given. A copy of the rules, certified by the Registrar of Friendly Societies, should also be furnished, to show that the receipt is in the form specified in the schedule to the rules (see s. 5). Where a mortgage to an incorporated society is vacated by an indorsed receipt, it should be seen to be under the society's common seal, counter-

signed by the secretary or manager, in the form given in the schedule to the Act of 1874 (see 37 & 38 Vict. c. 42, s. 42), and the fact of the society's incorporation should be ascertained by inspection of the certificate of incorporation. A copy of the rules, certified by the secretary, should also be required, to see that any provisions as to the use of the common seal have been observed (see s. 16); and inquiry should be made of the Registrar of Friendly Societies, to ascertain that the registry of the society has not been cancelled or suspended (see 57 & 58 Vict. c. 47, s. 6). It must further be remembered, that although the effect of the statutory receipt under either Act is to vest the estate in "the person for the time being entitled to the equity of redemption," this has been held to mean the person having the best right to call for it (see *Hosking v. Smith*, 1888, 13 App. Cas. 582). In order to determine the position of the estate, it should accordingly be ascertained, not merely whether there was any subsequent incumbrance at the time, but also by whom the mortgage was paid off (see *Sangster v. Cochrane*, 1884, 28 Ch. D. 298).

Company.—In the case of a conveyance by a company, registered under the Companies Act, 1862, a copy of the memorandum and articles of association should be furnished, to show the power of disposition: and the original memorandum and articles, and the certificate of incorporation, should be inspected at the office of the Registrar of Joint-Stock Companies. It should also be seen that the conveyance is executed in accordance with the articles, though it is unnecessary to require the minutes of the resolution authorising its execution to be produced (see *County of Gloucester Bank v. Rudry Merthyr, &c. Co.* [1895], 1 Ch. 629).

Compounding Debtor.—If the grantor appears to have been a debtor, whose creditors had accepted a composition under one of the Bankruptcy Acts, the resolution for composition should be abstracted and an office copy produced, and it should be ascertained by search at the Bankruptcy Office that the grant has not been defeated by the grantor's bankruptcy, and that any recorded act of bankruptcy has ceased to be available for adjudication (see *In re Kearley & Clayton*, 1878, 7 Ch. D. 615). In the case of a composition under the Act of 1883, or the Act of 1890, it should also be ascertained that the debtor's estate has not been divested by the appointment of a trustee (see 46 & 47 Vict. c. 52, s. 18; 53 & 54 Vict. c. 71, s. 3).

Devisee.—Where the grantor is a devisee, it should be seen that any legacies or annuities charged on the property by the will have been released (see *In re Rebbeck* [1894], 42 W. R. 473); unless the devise is also subject to a general charge of debts, in which case it is conceived that the devisee can make a title (see *Colyer v. Finch*, 1856, 5 H. L. C. 905). Where there is no charge, the purchaser is not concerned to see to the payment of either debts or legacies (see *British Mutual Investment Co. v. Smart*, 1875, L. R. 10, Ch. 567). If the conveyance appears to have been made in pursuance of a contract for sale entered into by the testator, the executor's receipt for the purchase-money should be abstracted and produced (see *In re Manchester and Southport Ry. Co.*, 1854, 19 Beav. 365). In the case of a disposition by the devisee of mortgage estates, the receipt for the consideration should be seen to be signed by the executor, whether the instrument be a reconveyance, transfer, or conveyance under the mortgagee's power of sale.

Executor.—Where leaseholds are assigned by an executor, the probate should be produced as evidence of his title; and if the will contains any specific bequest of the property, the concurrence of the legatee should be shown, or a written acknowledgment obtained from him that the bequest had not been assented to. Where freeholds are conveyed by an executor,

it should be seen either that the estate was devised to him charged with debts (see *Corser v. Cartwright*, 1875, L. R. 7 H. L. 731), or that he had power to sell by virtue of a direction in the will (see *Hamilton v. Buckmaster*, 1866, L. R. 3 Eq. 323), or under some statute. A charge of legacies is not sufficient, except in cases within 22 & 23 Vict. c. 35, s. 16 (see *In re Rebbeck* [1894], 42 W. R. 473).

Heir.—Where a conveyance is made by an heir, letters of administration to the ancestor's estate should be produced, and evidence of the intestacy furnished; and search should be made to see that no will has been proved. It must also be observed, whether the ancestor took by descent, or whether he was the last purchaser; and the rules of descent laid down by the Inheritance Act, 1833, must be borne in mind. It must be seen that the alleged heir survived the intestate, and that there is sufficient evidence of the relationship and of the failure of nearer heirs. If the property is situate in Kent, the custom of gavelkind must be remembered; and, in the case of copyhold property, the custom of the manor must be ascertained from the steward. It should also be seen that the widow's dower or free bench and her rights (if any) under the Intestates' Estates Act, 1890, have been released; or, if the intestate was a married woman, that any right of the husband to curtesy has been discharged.

Legatee.—Where leaseholds are assigned by a legatee, the executor's written assent to the bequest should be shown, unless he joined in the assignment. If the assignment is made by a residuary legatee, all legacies and annuities given by the will should also be shown to have been paid or duly appropriated (see *In re Outhwaite* [1891], 3 Ch. 494); but the purchaser is not concerned to inquire whether the testator's debts have been paid, as they are not a charge on the assets (see *British Mutual Investment Co. v. Smart*, 1875, L. R. 10 Ch. 567).

Life Tenant.—Where a life tenant purports to grant the fee-simple, it must be seen that the conveyance is dated since the Settled Land Act, 1882, came into operation, and it must be ascertained that there were trustees of the settlement for the purposes of the Act, and that the purchase money was paid either to them or into Court at the request of the life tenant (see 45 & 46 Vict. c. 38, s. 22); and if the property conveyed was the principal mansion-house, the written consent of the trustees, or an order of the Court authorising the sale, should be abstracted and produced (see 45 & 46 Vict. c. 38, s. 15; 53 & 54 Vict. c. 69, s. 10). The concurrence of any persons having estates, interests, or charges, in priority to the settlement, or securing money actually raised, should be shown (see 45 & 46 Vict. c. 38, s. 20); and also, if the life tenant has mortgaged or assigned his estate, the concurrence of the mortgagee or assignee (s. 50); unless the assignment was in consideration of marriage or by way of family arrangement (53 & 54 Vict. c. 69, s. 4). If the land is settled by way of trust for sale, the order of the Court giving the life tenant leave to sell should be abstracted and produced (see 47 & 48 Vict. c. 18, s. 7).

Liquidation Trustees.—In the case of a conveyance by the trustee of a liquidating debtor, the resolutions for liquidation and appointment of a trustee should be abstracted and an office copy produced. An office copy of the certificate of the trustee's appointment should also be produced, as his appointment only takes effect from the date of the certificate (see 32 & 33 Vict. c. 71, ss. 18, 125).

Liquidator.—Where a conveyance is made on a sale by the liquidator of a company registered under the Companies Act, 1862, it must be seen that the conveyance is made in the name of the company, and is under its

common seal. If made in a compulsory winding-up, the winding-up order and the order appointing the liquidator should be abstracted and produced, and if the winding-up order was prior to the Companies (Winding-up) Act, 1890, the order authorising the sale should be abstracted and produced (see 25 & 26 Vict. c. 89, s. 95; 53 & 54 Vict. c. 63, ss. 12, 31). If the winding-up order is made by a County Court, the jurisdiction should be shown (see *In re Bowling and Welby* [1895], 1 Ch. 663). If the conveyance is made in a voluntary winding-up, the resolution for winding-up should be abstracted, and evidence given of its having been passed in accordance with the articles (see 25 & 26 Vict. c. 89, s. 129; *In re Sheffield, &c. Co.*, W. N. 1887, 218). If the conveyance is made in a winding-up under supervision, the same points require attention as in the case of a voluntary winding-up; the supervision order and any order appointing additional liquidators should also be abstracted and produced, and any restrictions imposed by the Court should be seen to have been observed (see 25 & 26 Vict. c. 89, ss. 150, 151).

Lunatic's Committee.—In the case of a conveyance on a sale by the committee of a lunatic, the order of the Court of Lunacy authorising the sale should be abstracted, and an office copy produced; and it should be seen that the committee executed the conveyance in the name and on behalf of the lunatic (see 53 Vict. c. 5, ss. 120, 124).

Married Woman.—A conveyance by a married woman of freeholds, other than separate estate, should be ascertained to have been executed by her husband and duly acknowledged by her, unless the Married Women's Property Act, 1882, applies. The same formalities should be ascertained to have been observed on a conveyance of separate estate, unless the legal estate was outstanding in trustees, in which case it is sufficient to see that they joined in the conveyance (see *Taylor v. Meads*, 1865, 4 De G., J. & S. 597). But in every case it should be ascertained that there was no restraint on anticipation (see *Stanley v. Stanley*, 1878, 7 Ch. D. 589). It must be remembered that acknowledgment and the husband's concurrence are equally necessary in respect of estates vested in a married woman as trustee, even since the Act of 1882 (see *In re Harkness and Allsopp* [1896], 2 Ch. 358); unless she was merely a bare trustee, and the case falls within sec. 6 of the Vendor and Purchaser Act, 1874, or sec. 16 of the Trustee Act, 1893. An office copy of the certificate of acknowledgment should be produced as the only sufficient evidence of the acknowledgment (see *Jolly v. Handcock*, 1852, 7 Ex. Rep. 820); except in cases within the Conveyancing Act, 1882, which makes the indorsed memorandum of acknowledgment sufficient (s. 7). In the case of an assignment of a married woman's leaseholds, not within the Married Women's Property Act, 1882, it should be seen that the husband was a conveying party, and if her estate was merely equitable, or could not fall into possession during the coverture, it should be seen that the assignment was duly acknowledged, unless the property was separate estate.

Mortgagee.—Where a conveyance appears to have been made by a mortgagee selling under his power of sale, it should be seen that the mortgage money had become due, and also that such default had been made in payment of principal or interest as to render the power exercisable, and that any notice required by the power had been given, unless the mortgage deed contains a clause protecting the purchaser (see *Dicker v. Angerstein*, 1876, 3 Ch. D. 600), or such a clause is implied by statute (see Conveyancing Act, 1881, s. 21); bearing in mind that a clause of this kind is no protection against a known irregularity (see *Selwyn v. Garfit*, 1888,

38 Ch. D. 273). If the conveyance is made by the survivor of several mortgagees, it must be seen that the mortgage contained a proper joint account clause, or power for the survivor to give receipts, unless the case falls within sec. 61 of the Conveyancing Act, 1881. If the mortgagee purports to convey as absolute owner after a foreclosure order, it should be seen that all the persons interested in the equity of redemption were parties to, or duly represented in, the action.

Next of Kin.—In the case of an assignment of leaseholds by the next of kin of an intestate, it should be seen that the administrator joined to convey the legal estate, as his mere assent is not sufficient to pass it (see *Burton's Compendium*, 311); and it should be seen that the widow (if any) joined to release her rights.

Railway Company.—In the case of a conveyance by a railway company, it should be shown that the company had power to sell, which depends on the land having been acquired for extraordinary purposes under sec. 13 of the Lands Clauses Consolidation Act, 1845, or having become superfluous under sec. 127; and, in the latter case, it should be ascertained that the rights of pre-emption of all original and adjoining owners under sec. 128 have ceased (see *South-Western Railway Co. v. Blackmore*, 1870, L. R. 4 H. L. 610). It should also be seen that the conveyance is under the company's common seal (see s. 131).

Tenant in Tail.—A conveyance by a tenant in tail must be seen to pass the estate, and not merely declare a trust (see *Green v. Paterson*, 1886, 32 Ch. D. 95), and must be ascertained to have been enrolled in Chancery within six months after execution (see 3 & 4 Will. iv. c. 74, s. 41), unless effectuating a sale under the powers of the Settled Land Act, 1882, in which case it stands on the same footing as the conveyance of a life tenant under the same Act (45 & 46 Vict. c. 38, s. 58). If there is a prior life estate under the same settlement, it should be seen that the protector gave his consent either by the disentailing deed, or by a previous or contemporaneous deed, enrolled either previously or at the same time (see 3 & 4 Will. iv. c. 74, ss. 42, 46). If the tenant in tail was a married woman, it should be seen that the husband concurred, and that the deed was duly acknowledged (see *Cooper v. Macdonald*, 1877, 7 Ch. D. 295), unless the Married Women's Property Act, 1882, applies (see *In re Drummond and Davie* [1891], 1 Ch. 524).

Trustees.—In the case of a conveyance by trustees, it must be ascertained that the time and mode of sale are authorised by the trust (see *In re Bryant and Barningham*, 1890, 44 Ch. D. 218), and that any person whose consent was required joined in the conveyance. It must be remembered that if the sale is in exercise of a power, the consent of the person entitled to the rents is necessary, in cases within sec. 10 of 23 & 24 Vict. c. 145; and where the conveyance is after the Settled Land Act, 1882, came into operation, the concurrence of the life tenant is required (45 & 46 Vict. c. 38, s. 56); and if he has assigned his interest or become bankrupt, the consent of his assignee or trustee in bankruptcy should be shown (see *In re Beddingfield and Herring* [1893], 2 Ch. 332). It should be seen that the trust instrument contains an express power to give receipts or direction for payment to the trustees, unless there is a trust for payment of debts, or a statutory power to give receipts exists (see 22 & 23 Vict. c. 35, s. 23; Trustee Act, 1893, s. 20). It should also be seen that the power of sale has not come to an end (see *In re Sudeley and Baines* [1894], 1 Ch. 334). If trustees of a partial interest have joined with the other owners in selling, it should be seen that the purchase-money was apportioned, and that they

received their proper share (see *In re Cooper and Allen*, 1876, 4 Ch. D. 802).

In considering the effect of a will, every clause from beginning to end must be carefully read, bearing in mind the rules of construction laid down by the Wills Act, 1837. It must be ascertained whether the property is comprised in any specific devise, or whether it passes under a residuary gift, and whether the devisee's interest has lapsed by his predeceasing the testator; and here the special provisions as to devises in tail and gifts to children and issue (1 Vict. c. 26, ss. 32, 33), and the effect of a gift to a class (see *In re Harvey* [1893], 1 Ch. 567) must not be forgotten.

In the case of a married woman's will, it must be shown either that she had a power of appointment over the property, or that it was her separate estate; and in the latter case it must be seen that the legal estate is got in from the heir, or the trustee in whom it was vested (see *Hall v. Waterhouse*, 1865, 6 N. R. 20); unless the Married Women's Property Act, 1882, applies. It must also be borne in mind, if she survived her husband, that property acquired after his death does not pass (*In re Price*, 1885, 28 Ch. D. 709), unless the will has been re-executed since his death, or the case falls within the Married Women's Property Act, 1893, 56 & 57 Vict. c. 63.

In the case of the will of a mortgagee dying before the Conveyancing Act, 1881, came into operation, it must be observed whether there is a devise of mortgage estates, and if not, whether there is any general devise wide enough to pass them (see *In re Packman and Moss*, 1875, 1 Ch. D. 214). So, if the title is traced through the will of a trustee, in cases not within sec. 5 of the Vendor and Purchaser Act, 1874, or sec. 30 of the Conveyancing Act, 1881, it must be observed whether there is a devise of trust estates, and if not, whether they pass by a general devise (see *In re Bellis*, 1877, 5 Ch. D. 504).

The whole will must be searched to see that the devise is not rendered defeasible by a gift over; and the validity of any contingent limitations or executory devises must be considered (bearing in mind the alterations in the law effected by the Contingent Remainders Act, 1877, and sec. 10 of the Conveyancing Act, 1882). It must be noticed whether any legacies or annuities are charged on the property, and whether there is a charge of debts, and also whether the devisee is made a trustee, with or without power of sale.

In the case of a beneficial devise, it should be seen that the attesting witnesses do not include the devisee, or the husband or wife of the devisee (see 1 Vict. c. 26, s. 15). If the property is freehold, situate in Middlesex or Yorkshire, it should be ascertained whether the will was registered within six months after the testator's death, and if not, whether the defect is cured by sec. 8 of the Vendor and Purchaser Act, 1874. But if the property is leasehold, the fact of the will not being registered seems to be of no importance, as the title must be traced through the executor (see Sugden, *Vendors and Purchasers*, 546). If probate has not been obtained of a will of freeholds, by reason of its not comprising any personal estate, the original will must be ascertained to be duly signed by the testator and attested by two witnesses, in accordance with the Wills Act, 1837; and the death of the testator must be proved, and search made to see that no other will has been proved. But where the property consists of leaseholds, probate of the will should be required, as it is part of the evidence of title.

In the case of copyholds, the title should commence with a surrender and admittance forty years old (see Dart, *Vendors and Purchasers*, 339);

and, in considering the effect of all subsequent surrenders and admittances, it must be remembered that the legal estate only passes by admittance (Scriven, *Copyholds*, 7th ed., 122), and also that any departure in an admittance from the uses of the surrender is void (Scriven, *Copyholds*, 102). There is usually more difficulty in identifying the property than in the case of freeholds, as old descriptions are commonly retained on the Court rolls long after they have ceased to be applicable; hence a statutory declaration of enjoyment, according to the title shown, is in most cases necessary. The copies of Court roll should be ascertained to be signed by the steward, and all surrenders should be seen to be duly stamped.

A surrender by a married woman should be ascertained to have been made upon her separate examination, and with the concurrence of her husband, in all cases not within the Married Women's Property Act, 1882; or if her interest was merely equitable and conveyed by deed, it should be seen to have been executed by the husband and duly acknowledged, except in the case of separate estate.

A surrender or deed, by which an estate tail is barred, should be seen to be entered on the Court rolls within six months after execution (see *Green v. Paterson*, 1886, 32 Ch. D. 95); and if there is a protector, his consent should be seen to have been entered at the same time or previously (see 3 & 4 Will. IV. c. 74, ss. 50, 54).

If any lease for more than a year has been granted, the licence of the lord of the manor should be shown, as otherwise it would be a cause of forfeiture of the copyholder's interest (see Scriven, *Copyholds*, 209).

In this way the person perusing the abstract must proceed, questioning everything and taking nothing for granted, to ascertain whether each instrument accomplishes its professed object. Every defect discovered must be considered, to see whether it has been cured by time or subsequent disposition, or whether it constitutes a subsisting objection to the title. A purchaser is not bound to be suspicious (see *Bailey v. Barnes* [1894], 1 Ch. 25); but if any instrument appears to be of doubtful validity, inquiry should be made into the circumstances of the case. Breaches of trust disclosed by the abstract, charges, and outstanding estates, must all be noted, and requisitions made for clearing the title, so far as not precluded by the contract. In this connection, it is to be observed that a condition which does not fairly state the facts or the defect, is not binding in equity (see *St. Saviour's Rectory Trustees and Oyler*, 1886, 31 Ch. D. 412).

If the property is sold as freehold, or if nothing is said about the tenure, it must be seen that a title is shown to the freehold, and not merely to a copyhold or leasehold interest (*Hart v. Swaine*, 1877, 7 Ch. D. 42). So, where a title depends on a term having been enlarged into a fee-simple, the case must be ascertained to be within sec. 65 of the Conveyancing Act, 1881, and sec. 11 of the Conveyancing Act, 1882. On the purchase of ground rents, the length of the term as well as the amount of rent reserved by each lease must be seen to agree with the contract, as any material discrepancy would be a ground for compensation. So, if leaseholds are purchased, it should be ascertained that the lease under which the property is held is correctly stated in the contract, both as to the term and rent, as a mis-statement would entitle the purchaser to compensation, or in some cases even to rescission of the contract (see *Jones v. Rimmer*, 1880, 14 Ch. D. 588). So, if the vendor contracts to sell the property subject to an apportioned rent, it should be seen that the apportionment has been properly made. The lease under which the property is held, should also be ascertained not to contain any clause em-

powering the lessor to determine it before the end of the term (see *Weston v. Savage*, 1879, 10 Ch. D. 736); if it contains a proviso for re-entry for breach of covenant, it should be ascertained not to comprise other property (see *Creswell v. Davidson*, 1887, 56 L. T. 811); and if the property has been sublet, the under-lease should be shown to contain similar covenants to those in the superior lease (see *Darlington v. Hamilton*, 1854, Kay, 550).

The devolution of both legal estate and equitable interest must be carefully traced, and as neither confers a marketable title without the other, it must be seen that the vendor either has or can procure the conveyance of both. All contingencies on which the title depends should be ascertained to have happened, and the title shown not to be defeasible by any event or by the act of any person. Thus, if the title depends on the vendor surviving A., A.'s death should be proved; if an option of purchase or overriding power of appointment is vested in B., it should be released; while, if the title depends on a doubtful question of fact or law, or on the construction of an ambiguous will, all the parties taking in any event should join in the conveyance.

Any restriction as to user or alienation must be observed, as, unless the sale is made subject thereto, it might be a fatal objection; as, where a disused burial-ground is sold for building purposes (see *In re Ponsford and Newport District School Board* [1894], 1 Ch. 454); or where leaseholds are subject to a covenant against assignment without licence (see *Bishop v. Taylor*, 1891, 39 W. R. 542).

All estates prior to the vendor's should be shown to have determined, unless the persons in whom they are vested are to join in the conveyance; thus the death of life tenants, tenants by the curtesy, and annuitants, should be proved by production of certificates of death, while in the case of a prior estate tail, the death of the tenant in tail and failure of his issue should be proved, and a search for disentailing deeds made. Dower is now seldom an incumbrance except where a prior owner has died intestate, but in that case its release should be procured. Any subsisting mortgage should be required to be released by the mortgagee; and where the contract does not mention any tenancy, a lease must be treated as an incumbrance (see *Caballero v. Henty*, 1874, L. R. 9 Ch. 447).

If any owner in fee, life tenant, or annuitant has died within twelve years preceding the sale, evidence should be given of the discharge of all succession duty payable on his death; but any succession before that period may be disregarded, in reliance on sec. 12 of 52 Vict. c. 7. So, evidence of payment of any temporary estate duty, payable under the Inland Revenue Act, 1889, or of any estate duty and settlement estate duty, payable under the Finance Act, 1894, should be furnished. In the case of leaseholds, all succession duty should be shown to be discharged; but, except where freedom from succession duty is dependent thereon, no inquiry need be made as to whether the right amount of probate or estate duty has been paid (see *In re Culverhouse* [1896], 2 Ch. 251). As to settlement estate duty, however, see 59 & 60 Vict. c. 28, s. 19.

Inquiry should be made of the vestry or local authority as to the existence of any statutory charge for paving or sewerage expenses or private street works; and if the work is complete at the date of the contract, the vendor should be required to discharge it (see *In re Bettsworth and Richer*, 1888, 37 Ch. D. 535).

Inquiry should in general be made whether the vendor has executed any settlement, as, although no answer may be received beyond a reference to *In re Ford and Hill*, 1879, 10 Ch. D. 365, the inquiry calls attention to the

point, and throws the responsibility of any suppression on the vendor's solicitor, if he does not trouble to ascertain whether such an instrument exists. Where the vendor is a mortgagor, selling an equity of redemption, inquiry should be made of the mortgagee as to the amount owing on his security, at the same time informing him of the intended purchase. Occupying tenants should be interrogated as to the nature of their holding, and the person to whom they pay rent (see *Holmes v. Powell*, 1856, 8 De G., M. & G. 572).

Searches should be made against the vendor for judgments, and writs of execution, crown debts and executions, annuities and *lis pendens*, and also for writs and orders affecting land, deeds of arrangement and land charges, and for bankruptcy, liquidation, and composition proceedings, unless he is merely a trustee or mortgagee, in which case a search for *lis pendens* seems to be in general sufficient (see Elphinstone and Clark on *Searches*, xxv.—xxxi.). If the property is freehold or leasehold, and is situate in Middlesex or Yorkshire, the local registry should be searched, and, in the case of copyholds, a search should be made in the Court rolls, to see that no instruments are omitted from the abstract. All these searches should in general be carried back to the last purchase for value.

Production of the abstracted deeds and documents should in all cases be required for the purpose of ascertaining that they are correctly abstracted, and have not been handed to a mortgagee or lost. If the recent title-deeds are lost, the title cannot be considered as marketable; but the mere fact of some of the earlier title-deeds having been lost is no objection, if from their age or nature their absence does not render the title doubtful (see Sugden, *Vendors and Purchasers*, 437). A title may be good without any deeds, as where the vendor holds under a succession of wills (see *Bulley v. Bulley*, 1874, L. R. 9 Ch. 747); but great caution is necessary to make sure that no deeds exist, and that their absence is not due to their having been deposited as a security.

[See Preston, *Abstracts of Title*, 2nd ed., 1823; Atkinson, *Marketable Titles*, 1833; Gardenor, *Directions for drawing Abstracts of Title*, 2nd ed., 1847; Moore, *Instructions for Preparing Abstracts of Title*, 4th ed., 1896; Comyns, *Exercises on Abstracts of Title*, 5th ed., 1895; Bythewood and Jarman, *Precedents in Conveyancing*, 4th ed., 1884, vol. i.; Sugden, *Vendors and Purchasers*, 14th ed., 1862, ch. x. to xii.; Dart, *Vendors and Purchasers*, 6th ed., 1888, ch. viii.; Prideaux, *Precedents in Conveyancing*, 16th ed., 1895, vol. i.; Clerke and Humphry, *Sales of Land*, 1885, ch. viii.; Emmet, *Notes on Perusing Titles*, 2nd ed., 1896; Dickins, *Requisitions on Title*, 1896; Gover, *Hints as to Advising on Title*, 3rd ed., 1896.]

Abuse of Process.—The Court has inherent jurisdiction to protect itself from the abuse of its own procedure, and so may stay or dismiss actions which are frivolous and vexatious (*Castro v. Murray*, 1875, L. R. 10 Ex. D. 213; *Dawkins v. Prince Edward*, 1876, L. R. Q. B. D. 499; *Metropolitan Bank v. Pooley*, 1885, 10 App. Cas. 210). The Court at any stage of the proceedings, if it appears that the action is frivolous or vexatious, or that the defence is so, has, by its inherent jurisdiction, power to stop the proceedings, or to strike out the defence (*Reichel v. Magrath*, 1889, 14 App. Cas. 665; *Davey v. Bentinck* [1893], 1 Q. B. 185). S. 24, subs. 5, of the Judicature Act, 1873, reserves to all the Courts generally the old power of restraining vexatious or unreasonable proceedings in any cause or matter before them, if they think fit (*In re Wickham* 1887, 35 Ch.

D. 280); but a judicial discretion must be used as to what proceedings are vexatious, for the Court must not prevent a suitor from exercising his undoubted rights on any vague or indefinite principle (see *per* Lord Halsbury, L. C., *Higgins v. Woodhall*, 1889, 6 T. L. R. 1).

It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases (*Lawrence v. Norreys*, 1890, 15 App. Cas. 210; R. S. C., Order 25, r. 4).

The Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, as in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

This rule considerably extends the power inherent in the jurisdiction of the Court, and enables it to stay an action on further grounds than those on which it could have been stayed at common law (*Metropolitan Bank v. Pooley*, *supra*). The rule allows a Court or a judge to strike out a statement of claim or defence, not upon the ground that it discloses no cause of action, or no defence, but upon the ground that it discloses no reasonable ground of action or defence, which is another thing altogether (*per* Lindley, L. J., *Dadswell v. Jacobs*, 1887, 34 Ch. D. 284; *Kellaway v. Bury* [1892], 66 L. T. 602).

The object of the rule is to stop cases which are obviously frivolous or vexatious, or obviously unsustainable (*A.-G. Lancaster v. L. & N.-W. Ry. Co.* [1892], 3 Ch. 277). See STAY OF PROCEEDINGS.

Right of Action at Common Law.—Where one person uses legal machinery erroneously to the damage of another, the latter has a cause of action against the former, provided that the legal machinery has been used maliciously in the sense of being used for some indirect motive (*per* Bowen, L. J., *Horsley v. Style*, *infra*). To give such a right of action, it is necessary that the law should be set in motion maliciously and without reasonable and probable cause (*per* Lord Esher, M. R. S. C., *Gibbs v. Pike*, 1842, 9 Mee. & W. 351 (registration of an order); *Horsley v. Style* [1893], 69 L. T. 222 (erroneous registration under Bills of Sale Acts)).

Statutory Provision against.—To prevent abuse of the process of the High Court or other Courts by the institution of vexatious legal proceedings, the Vexatious Actions Act, 1896, 59 & 60 Vict. c. 51, empowers the Attorney-General to apply to the High Court for an order under the Act; and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable grounds in the High Court, or in any inferior Court, against the same or different persons, the Court may, after hearing such person, or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings be instituted by that person in the High Court or other Court unless he obtains leave of the High Court or a judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the Court, and that there is *prima facie* ground for such proceeding.

A copy of the order is to be published in the *London Gazette*.

The Act does not extend to Scotland or Ireland.

See VEXATIOUS INDICTMENTS.

Acceleration.—The falling into possession of an estate or interest in remainder or expectancy, by reason of the particular estate or preceding

interest being or becoming void. Thus, if lands be devised to an attesting witness of a will with a remainder over, the remainder takes effect at once (*Jule v. Jacobs*, 1876, 3 Ch. D. 703). In *Lainson v. Lainson*, 1854, 5 De. G., M. & G. 754, it was held that a remainder was accelerated by a revocation by a codicil of a life estate given by a will. It would seem from this case, and from *Clark v. Randall*, 1886, 31 Ch. D. 72, that the same principles apply to personalty and real estate as regards acceleration. The doctrine does not in general extend to appointments under powers. In *Crozier v. Crozier*, 1843. Dr. & War. 365, Lord St. Leonards stated that in cases of appointments by powers, although the estate for life is void, yet the remainder continues such, and the estate during the life of the intended taker goes as in default of appointment. In *Craven v. Brady*, 1867, L. R. 4 Eq. 209, Lord Romilly took an opposite view, but in that case there was a clear intention expressed in the will that, if the appointed life interest should cease by reason of forfeiture, then the estate appointed in remainder should take effect immediately. It should be noticed that, though he referred to *Crozier v. Crozier*, he said nothing of the passage in the judgment of Lord St. Leonards cited above.

[See also *Evestaff v. Austin*, 1854, 19 Beav. 591; *In re Townsend*, *Townsend v. Townsend*, 1887, 34 Ch. D. 357; *In re Johnson*; *Danily v. Johnson* [1893], 68 L. T. 20.]

Acceptance in Blank.—See **BILLS OF EXCHANGE.**

Acceptance of Bill.—See **BILLS OF EXCHANGE.**

Acceptance of Money paid into Court.—See **PAYMENT INTO COURT.**

Acceptance of Offer.—See **CONTRACT.**

Acceptance of Office of Director.—See **COMPANY.**

Acceptance of Service.—Solicitors, having the authority of their clients for so doing, may accept service, on their behalf, of writs of summons and the like processes by which proceedings are instituted. In *re Gray* [1892], 65 L. T. 743, Mr. Justice North held that the fact of a solicitor having acted for a client, a trustee, in all matters connected with the trust, did not authorise him to accept service, and enter an appearance for him, to an originating summons, it being necessary to show a special authority. The appearance was vacated at the instance of the defendant.

The personal service required by the rules for the above-mentioned processes is rendered unnecessary where the solicitor undertakes in writing to accept service, and enters an appearance (R. S. C., 1883, Order 9, r. 1). Until appearance has been entered, in the mode prescribed by Order 12, r. 8, no service has been effected. If, therefore, appearance is not entered, in pursuance of the undertaking, the solicitor is liable to attachment (Order 12,

r. 18). Where solicitors in an Admiralty action *in rem* accepted service, and undertook to put in bail, but did not enter an appearance, their authority having been withdrawn, it was held that they ought to have appeared. No express undertaking to appear had been given, but it was implied; and thus, though they could not be imprisoned, they were not allowed their costs (*The Anna Bertha* [1891], 64 L. T. 362).

In divorce proceedings, personal service of the citation is required, and an undertaking by the solicitor to accept service is bad; and the irregularity is not cured by appearance (*De Niceville v. De Niceville*, 1877, 37 L. T. 43).

So, in bankruptcy proceedings, where personal service is required by the rules, personal service must be effected.

The solicitor of a company against which a petition for winding-up is presented, may accept service for it, and service at the registered office may be dispensed with (*Regent United Service Stores*, 1878, 8 Ch. D. 75).

All orders, writs, and other proceedings, upon which process of execution or contempt may afterwards be issued, require, in general, personal service. This is not necessary, however, in the case of an application for a writ of attachment. Service on the solicitor on the record is sufficient (*Browning v. Sabin*, 1875, 5 Ch. D. 511; *In re a Solicitor*, 1880, 14 Ch. D. 152; *Joy v. Hadley*, 1883, 22 Ch. D. 572; and *In re Luzmore*, 1888, W. N. 63).

But if the application is for committal the practice is different; and a motion to commit must be served on the defendant personally. In *Mander v. Falcke* [1891], 3 Ch. 488, it was held that service on the solicitor was insufficient, and that the appearance of the defendant was no waiver of the irregularity. Until every effort to effect personal service has been made, substituted service will not be allowed.

By Order 31, r. 22, service of an order for interrogatories, or discovery, or inspection made against any party, or his solicitor, shall be sufficient to found an application for attachment for disobedience to the order. But the party against whom the application for an attachment is made may show, in answer to the application, that he has had no notice or knowledge of the application. And a solicitor upon whom such an order has been served, who neglects to give notice thereof to his client, is liable to attachment.

Acceptance of Shares.—See COMPANY.

Access of Husband to Wife.—See LEGITIMACY.

Access to Air.—See AIR.

Access to Highway.—See HIGHWAY.

Access to Infant.—See PARENT AND CHILD.

Access to Rivers.—See RIVERS.

Accession of Property.—Where any corporeal substance, over which rights of property are exercised, receives an addition, increase, or improvement, either in a natural way, as by the growth of fruits or the pregnancy of animals, or in an artificial way, as by the erection of houses on land, or the embroidering of cloth, such addition, increase, or improvement falls primarily to the owner of the original substance, subject in the second case to his paying compensation for material or labour expended. In a few instances, as where wine, oil, and bread are manufactured from another's grapes, olives, and flour, or a picture is painted on another's canvas, an exceptional rule prevails, the new products going to the operator subject to his compensating the owner of the materials. Two questions thus arise — (1) Which substance is of principal importance; and (2) What compensation, if any, is payable? There are four classes of accession: (1) land to land (see ACCRETION; ALLUVION); (2) moveables to land (see FIXTURES); (3) moveables to moveables; and (4) moveables to labour (see COMMIXTURE; CONFUSION; SPECIFICATION).

Accession of Sovereign.—The accession of a new sovereign takes place immediately on the death of the preceding monarch. Blackstone says (1 *Com.* 249), that “immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any interregnum or interval, is vested at once in his heir, who is *eo instanti* king to all intents and purposes.” This doctrine, which is expressed in the maxim, “The king never dies,” has been established law ever since the reign of Edward IV., before which time there were still traces of the elective origin of the monarchy. The legal effects of a demise of the Crown, which were formerly far greater than at present, will be discussed under DEMISE. The proceedings on the accession of a new sovereign are described in Anson's *Law and Custom of the Constitution*, vol. ii. p. 64. “A few hours after the death of William IV., Queen Victoria was proclaimed Queen, at Kensington Palace, as set forth in the proclamation, by the Lords spiritual and temporal of this realm, being here assisted with these of His late Majesty's Privy Council, with numbers of others principal gentlemen of quality, with the Lord Mayor, Aldermen, and citizens of London.” This body is said by Sir William Anson, citing *Hansard*, xxxix. 13, to represent a more ancient assemblage than the Privy Council, the *Witan* or *Commune Concilium* meeting to choose and proclaim the new king. The Queen then entered the room, addressed the Council, and took and subscribed the oath for the security of the Church of Scotland prescribed by the Act of Union with Scotland. The members of the late king's Privy Council were sworn in as members of Her Majesty's Privy Council, and a proclamation was issued continuing all officers under the Crown in their offices. Some months later, the Queen made the Declaration against Transubstantiation, according to the requirements of the Bill of Rights, 1 Will. & Mary, sess. 2, c. 2, which provides that a new sovereign “shall, on the first day of the meeting of the first Parliament next after his or her coming to the Crown, sitting in his or her throne in the House of Peers in presence of the Lords and Commons therein assembled, or at the coronation, whichever shall first happen, make, subscribe, and audibly repeat the Declaration against Transubstantiation,” as settled in 30 Chas. II. c. 2.”

Accessory (*Accessarius*).—A term derived from scholastic logic, and used in law to discriminate certain classes of accomplices from principals felons.

There are no accessories in treason (Fost. 341-346), or misdemeanour (*R. v. Burton*, 1875, 13 Cox C. C. 71; 1 Russ. on *Crimes*, 6th ed., 174); but a person who "abets, counsels, procures, or commands" a misdemeanour at common law, or under any Act passed before or since 1861, is triable and punishable as a principal offender (24 & 25 Vict. c. 94 s. 8; and see Arch. Cr. Pl., 21st ed., 15).

1. An accessory *before the fact* is a person who "abets, counsels, incites, moves, procures, hires, or commands," *i.e.* deliberately *instigates*, either personally or through a third person, others to commit a felony which is actually committed in his absence, but as the direct natural or probable result of his instigation (Fost., 2nd ed., 121-131, 369-372). He is distinct from a person who solicits, *i.e.* ineffectually endeavours to induce, another to commit felony (*R. v. Gregory*, 1866, L. R. 1 C. C. R. 77), and from one guilty of misprision of felony, *i.e.* who merely omits to give warning of a felony which he knows is about to be committed (Hawk., P. C., bk. ii. c. 29, s. 23; 1 Russ. on *Crimes*, 6th ed., 170; Arch. Cr. Pl., 21st ed., 14). The instigator, to be an accessory, must be so far away from the *locus delicti commissi* as not to be in a position to facilitate its commission (*R. v. M'Daniel*, 1755, 10 St. Tri. 147; Fost., 2nd ed., 121 etc.).

There being no agency in crime (see AGENT, CRIME BY,) a person accepting employment to commit felony is a principal, and the employer, if absent when the crime is committed, is accessory before the fact. But where an innocent agent is employed to commit a felony, *e.g.* uttering a forged cheque, or delivering poison intended to cause death, the instigator, the employer, though absent when the felony takes effect, is a principal and not an accessory (*R. v. Bull*, 1845, 1 Cox C. C., 281; 1 Russ. on *Crimes*, 6th ed., 165, 167; *R. v. Manley*, 1844, 1 Cox C. C., 104; Arch. Cr. Pl., 21st ed.).

The distinction between principals and accessories before the fact was material only so far as the punishment of the two was different, and because, at common law, conviction and attainder of one of the principals was necessary before an accessory could be tried, except by his own consent (Fost., 2nd ed., 360-368). Attainder was abolished by The Forfeitures Act, 1870, 33 & 34 Vict. c. 33, s. 1; but now accessories before the fact to any felony at common law, or under any statute (subject to any specific statutory exception), may be tried, convicted, and punished in all respects as if they were principal felons, without waiting for the trial of the principal felon (24 & 25 Vict. c. 94, ss. 1, 5; *R. v. James*, 1890, 24 Q. B. D. 439). Similar provisions are contained in the other Consolidation Acts of 1861 (24 & 25 Vict. c. 96, s. 98 (*larceny*); c. 97, s. 56 (*malicious damage*); c. 98, s. 49 (*forgery*); c. 99, s. 35 (*coinage offences*); c. 100, s. 67 (*offences against the person*); in the Piracy Act, 1837 (7 Will. IV. and 1 Vict. c. 88, s. 4), and the Explosives Act, 1883, 46 & 47 Vict. c. 3, s. 7).

2. An accessory *after the fact* is a person who, with knowledge or notice, after the commission of a felony, harbours, receives, relieves, comforts, assists, or maintains any person whom he knows to have been concerned in its commission (other than his or her wife or husband), *i.e.* who takes any active steps to shelter the felon from justice or to enable him to escape from justice, by concealing him or rescuing or releasing him from custody or otherwise—or it would seem by enabling him to get rid of his booty or the evidence of his felony (Fost., 2nd ed., 373; 3 Co. Inst., 138; Hawk., P. C., bk. ii. c. 29; 1 Russ. on *Crimes*, 6th ed., 176; Arch. Cr. Pl., 21st ed., 17, 1120). There are no accessories *after the fact* in misdemeanour (1 Hale, P. C., 613); but some of the acts which

in the case of felony would constitute an accessory after the fact would in misdemeanour be indictable as a conspiracy to defeat or prevent the course of justice, or as rescue or interference with officers of justice (Hawk., P. C., bk. ii. c. 29, s. 4; 1 Russ. on *Crimes*, 6th ed., 164; 3 Co. Inst. 139). And a receiver of stolen goods was not treated as accessory after the fact till 3 & 4 Will. & Mary, c. 9 (see Fost., 2nd ed., 377). Accessories after the fact are guilty of felony, and (in the absence of other express statutory provision, as in the case of murder, 24 & 25 Vict. c. 100, s. 67) are punishable by imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 94, s. 4).

Accessories before or after the fact can be tried either with the principal felon, or after him as accessories, or separately as for a substantive felony (24 & 25 Vict. c. 94, ss. 3, 5). And any number of accessories before or after the fact at different times can be tried together (24 & 25 Vict. c. 94, s. 6). As to forms of indictment, see Arch. Cr. Pl., 21st ed., 1115-1118. The proper place for the trial of accessories is—(1) In the case of felony wholly committed in England, any Court which can try the principal offender, or can try felonies in the place where the act constituting the accessory was done; (2) In the case of a felony committed partly on sea and partly on land, within or without the Queen's dominions, the Court which can try the principal offender or can try felonies committed in the county or place in which the accessory is apprehended or is in custody (24 & 25 Vict. c. 94, s. 7).

[On this subject, see further Stephen, *Dig. Crim. Law*, 5th ed., art. 40 *et seq.*; Stephen, *Hist. Crim. Law*, ii. 229; Pollock and Maitland, *Hist. Eng. Law*, ii. 508; Hawk., P. C., bk. ii. c. 29; Hale, P. C., 612-626; Foster, 2nd ed., 341-375; Arch. Cr. Pl., 21st ed., 10-14, 1114-1122; 1 Russ. on *Crimes*, 6th ed., 169-181; Mayne, *Criminal Law of India*, 1896, 429-457.]

Accident.—The word "accident" is constantly used in ordinary English, and therefore in law, in two senses, one much wider than the other. Strictly, an occurrence can only be said to be accidental when it is due neither to design nor to negligence. For, if an act be intentional, it is clearly no accident; if it be the result of culpable negligence, then by due care it could have been avoided, and the negligent person cannot be allowed to excuse himself by declaring it an accident. In this narrower sense of the word, an accident must be "nobody's fault" (12 App. Cas. 526). Any injury caused by lightning, tempest, or any extraordinary rainfall—any *vis major* or "act of God"—is accidental and therefore not actionable (*Nichols v. Marstrand*, 1876, 2 Ex. D. 1; *Nugent v. Smith*, 1876, 1 C. P. D. 423; see ACT OF GOD). The sudden and unexplained bolting of a horse would also be an accident in this sense. The loss of a deed, the disappearance of a will, may be accidental. Where rats on board a ship gnawed through a lead pipe, and the sea water consequently escaped and damaged the cargo, the judges were much divided; but the House of Lords eventually decided that this was a "danger or accident of the seas," the jury having expressly found that there was no negligence on the part of the shipowners (*Hamilton, Fraser, & Co. v. Pandorf & Co.*, 1887, 12 App. Cas. 518). So, in Courts of equity, the word "accident" has always been defined as "such an unforeseen event, misfortune, loss, act, or omission, as is not the result of any negligence or misconduct in the party" applying for relief (Story, 78). In criminal law, too, "an effect is said to be accidental when the act by which it is caused is not done with

the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it" (Stephen, *Dig. of Crim. Law*, art. 210).

In all crimes in which any form of deliberate or criminal intention or *mens rea* is of the essence of the offence, it is a defence or excuse to prove that the act relied on as constituting the crime was done by accident (*per infortunium*), not due to any default of the accused; unless the act which caused the accident was in itself unlawful, or was done unlawfully or without proper care or caution, having regard to its nature. In the case of homicide, persons causing the death of another by misadventure are expressly exempted from punishment (24 & 25 Vict. c. 100, s. 7). But this does not extend to cases where death is due to careless use of firearms or reckless driving (*R. v. Salmon*, 1880, 6 Q. B. D. 79; *R. v. Fenton*, 1830, Lew. C. C. 179; Stephen, *Dig. Crim. Law*, 5th ed., art. 237; Mayne, *Criminal Law of India*, 1896, pp. 361-364).

But the word is constantly used in a wider sense. We call a collision on a railway an accident, whether it is caused by any one's negligence or not. And the word is used in this more extended meaning in the title of Lord Campbell's Act (8 & 9 Vict. c. 93) (*q.v.*), and throughout the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28) (see ACCIDENTS, NOTICE OF); while, in policies of assurance against accidents, the word usually covers the results of the assured's own negligence as well as that of other people.

Accident Insurance.—There has been a considerable development of this branch of insurance during the last twenty or thirty years, owing no doubt to the multiplicity of machinery and the great increase of traffic in our streets. Under the form of policy which is most commonly used, the assured or his representative is entitled to certain fixed payments in case he sustains any bodily injury, "caused by violent, accidental, external, and visible means," and resulting in death or disablement within three months of the accident. "Disablement" means that the assured is prevented, wholly or partially, from attending to his ordinary business; it may be either permanent or temporary, total or partial; and these terms are, as a rule, carefully defined in the policy. The amount payable in case of death and the weekly compensation for disablement are fixed by the policy, without any regard to the income or earnings of the assured; in other words, the contract is not one of indemnity. But the weekly payments continue only so long as the assured is disabled, and the policy usually provides that in no case shall such compensation be payable for more than twenty-six weeks for any one accident. The period covered by the insurance is generally one year, though it may be limited to any period, or confined to a particular journey. At the end of the year the directors are in no way bound to renew the policy; they may continue it or not, at their pleasure (*Simpson v. Accidental Death Insurance Co.*, 1857, 2 C. B. N. S. 257).

What Accidents are within the Policy.—The risk insured against is generally defined with exactness in the conditions of the policy.

1. There must as a rule be some external violence operating directly upon the person of the assured. If the assured's own voluntary act produces as its ordinary result some injury to himself, this is not covered by the policy (*Clidero v. Scottish Accident Insurance Co.*, 1892, 10 Rettie's Scotch Session Cases (4th series), 355; but see *Hamlyn v. Crown Accidental Insurance Co.* [1893], 1 Q. B. 750. Thus suicide is not an accident. But

suicide is not to be presumed (*Trew v. Railway Passengers Assurance Co.*, 1861, 6 H. & N. 839; 30 L. J. Ex. 317).

2. There is generally a proviso which excludes death or disablement resulting from any natural disease or internal weakness, or any medical operation rendered necessary by any such disease or weakness. Under this proviso it has been held that the insurer was not liable for death caused by sunstroke (*Sinclair v. Maritime Passengers Assurance Co.*, 1861, 3 El. & El. 478; 30 L. J. Q. B. 77).

3. The policy does undoubtedly protect the assured from the consequences both of his own and of other people's negligence. Thus compensation has been recovered in cases where the accident was caused by the assured jumping in or out of railway carriages or omnibuses while in motion. It is usual now, however, for the insurance company to guard itself by a proviso that the policy shall not cover any injury caused by the assured's acting in contravention of the by-laws of any public company. It is usual also to exclude any accident which happens to the assured while he is under the influence of intoxicating liquor. The meaning of this proviso was discussed in *Mair v. Railway Passengers Assurance Co.*, 1877, 37 L. T. 356. But, in all cases not covered by such exceptions, the assured can recover, though his own misconduct or negligence conduced to the accident. Some companies also insert in their policies a clause excluding liability for injuries sustained by the assured "while wilfully (or wantonly) exposing himself to unnecessary danger," or "to obvious risk of injury." This clause has been much discussed in America. In England there is a *nisi prius* ruling in *Shilling v. Accidental Death Insurance Co.*, 1858, 1 F. & F. 116, and a division of opinion in *Mair v. Railway Passengers Assurance Co.*, 1877, 37 L. T. 356; but only one decision. In the case of *Cornish v. Accident Insurance Co.*, 1889, 23 Q. B. D. 453, it was laid down that the exception must not be taken too literally; that some qualification must be put on the words used, otherwise the contract would be rendered practically illusory; but that the clause had the effect of excluding all accidents which arose from the assured exposing himself to risk of injury, if such risk was obvious to him at the time; or would have been obvious to him if he had paid reasonable attention to what he was doing (*ib. p.* 456).

4. The death or disablement must be the direct result of the accident. As a rule this is a simple issue of fact. But legal questions of some difficulty arise, when two or more causes contribute to produce death or injury to the assured. *E.g.*, if a man suffering from a serious illness meets with an accident, and subsequently dies, it may be difficult to determine whether his death was caused by the illness or by the accident. A rough-and-ready method was at one time adopted (or suggested), namely, to decide the question by proximity in point of time. If the illness preceded the accident, it was presumed that the illness could not be the cause of death, for the patient lived till the accident happened. If, however, the accident was first in date, and the patient survived it, then the death must be the result of the subsequent disease. But the cause of death cannot be ascertained merely by comparing dates in this way. The rule (if it ever deserved that title) that the proximate cause in point of time was alone to be regarded, is no longer recognised. The question in every case is, What really caused the death? Which was the *causa causans*? Thus, if an accident brings on, as its natural or very usual result, some form of disease such as hernia or erysipelas, and that hernia or erysipelas causes death, then here clearly the accident directly causes the death, though it preceded the disease in point of time; the whole train of circumstances

constitutes a single cause (*Isitt v. The Railway Passengers Assurance Co.*, 1889, 22 Q. B. D. 504). And this is so, although the policy expressly provides that the insurance shall not extend to hernia or erysipelas, or other form of disease. Unless the terms of the policy make it clear that the intention of the parties was otherwise, such an exception will not protect the insurer when these diseases are the direct result of an accident, within the meaning of the policy. The accident is then regarded as the cause of death or disablement, and the interposed disease is merely a link in the chain of circumstances, and not a separate and independent cause (*Fitton v. Accidental Death Insurance Co.*, 1864, 17 C. B. N. S. 122; *Smith v. The Accident Insurance Co.*, 1870, L. R. 5 Ex. 302). Again, if a man is afflicted with a dangerous disease, and an accident occurs to him during his illness, and after the accident he dies of the disease, then, *ex hypothesi*, the accident is not the cause of death (*Cawley v. National Employers' Association*, 1885, 1 C. & E. 597). Thus, where the assured both before and after the accident suffered from Bright's disease, and died from that disease, but the progress of the disease was accelerated by an accidental fall from his dogcart, the Court held that it had not been proved that the assured died from the accident, and gave judgment for the defendants (*McKechin's Trs. v. Scottish Accident Assurance Co.*, 1889, 17 Rettie's Scotch Session Cases (4th series), 6). It is now very usual to insert in the policy an express provision excepting the insurer from liability in the case of death or injury resulting from internal disease, *although accelerated by accident*. But it would seem that no such clause is necessary (*ib.*). So, too, where the assured, whilst crossing and fording a stream, was seized with an epileptic fit and fell into the stream, and was there drowned whilst suffering from the fit, the Court of Appeal held that the death was occasioned by "accidental, external, and visible means," and that the company was liable, although the policy contained a proviso that the insurance should not extend "to an injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease"; for the assured sustained no personal injury which could occasion death except the drowning, which was accidental (*Winspear v. Accident Insurance Co.*, 1880, 6 Q. B. D. 42; and see *Reynolds v. Accidental Insurance Co.*, 1870, 22 L. T. 820; *Lawrence v. Accidental Insurance Co.*, 1881, 7 Q. B. D. 216).

Defences to an Action on the Policy.—As in all other cases of insurance, the assured must make a full disclosure of all material facts. If there be any false statement or misrepresentation, or any suppression of the truth, whether fraudulent or not, in any proposal or application for the policy, or in any claim made under it, the contract is void (see *London Assurance v. Mansel*, 1879, 11 Ch. D. 363; *Thomson v. Weems and others*, 1884, 9 App. Cas. 671). The same result will follow in the case of death, if the insurance was really effected by someone who had no insurable interest (see LIFE INSURANCE—INSURABLE INTEREST) in the life of the assured; and this whether the policy was made out in the name of the assured or not (*Shilling v. Accidental Death Insurance Co.*, 1857, 2 H. & N. 42; 26 L. J. Ex. 266). Then, it is generally made a condition precedent to any liability on the part of the insurance company, that notice of any accident should be promptly given to them at their head office; and if so, the absence of such notice is a defence to any action on the policy, even though it was impossible to give the required notice (*Cassel v. Lancashire and Yorkshire Accident Insurance Co.*, 1885, 1 T. L. R. 495; *Cawley v. National Employers' Association*, 1885, 1 C. & E. 597; *Gamble v. Accident Assurance Co.*, 1869, Ir. R. 4 C. L. 204). But, to produce this result, the giving of such notice must be expressly made a con-

dition precedent to liability (*Stoneham v. Ocean Accident Assurance Co.*, 1887, 19 Q. B. D. 237). See CONDITIONS PRECEDENT. The policy often provides in addition that the company may, if it thinks fit, send its own medical man to attend or visit the assured, or have a post-mortem examination, or require other proof satisfactory to its directors of the cause of death, of the nature of the accident, of the extent of disablement, etc. And compliance with these provisions may also be made a condition precedent to liability. But it must be remembered that "proof satisfactory to the directors" in such a provision means "proof which ought to be satisfactory to the directors" (*Braunstein v. Accidental Death Insurance Co.*, 1861, 31 L. J. Q. B. 17); and that the assured or his representative is not bound to forward any such proof after the company has once definitely repudiated all liability (*Shiells v. Scottish Assurance Corporation*, 1889, 16 Rettie's Scotch Session Cases (4th series), 1014). Lastly, the policy usually contains a clause entitling the company, if it thinks fit, to have any dispute referred to arbitration; and if the clause be drawn in such a way that no cause of action accrues till the amount payable has been determined by arbitration, then such a clause is a condition precedent, and will afford an answer to any action (*Caledonian Assurance Co. v. Gilmour* [1892], App. Cas. 85). In any arbitration under such a clause, the arbitrators or umpire have now full power to state, in the form of a special case, any question of law arising in the course of the reference (52 & 53 Vict. c. 49, ss. 7, 19; *Isitt v. Railway Passengers Assurance Co.*, 1889, 22 Q. B. D. 504). See ARBITRATION.

Employers' Liability, etc.—There is another form of accident insurance which has become common since the passing of the Employers' Liability Act, 1880. Under this form of insurance the insurer undertakes to indemnify the assured against any liability which he may incur for damages or costs, in case anyone in his employ should be accidentally injured and should claim compensation from his employer. The premium payable is usually calculated in the form of a percentage on the total amount of wages paid by the employer, but on various scales, according to the risks of the particular trade which he carries on. So, too, policies are now issued to the owners of public vehicles, indemnifying them against all claims by persons who may be injured by any accident when riding in, or alighting from, such vehicle. The owner of any private carriage may also be indemnified against the carelessness of his coachman, but not against negligence of his own.

All these are contracts of indemnity, and are regulated by the same rules as fire and marine insurance (see FIRE and MARINE INSURANCE); the principle of contribution is applicable; and the liability of the insurer depends on the antecedent liability of the assured. Unless the person injured has a valid claim for compensation against the assured, either at common law or under the statute, the assured has no insurable interest and no claim under the policy. And the word "accident" in such a policy means "any injury in respect of which compensation is properly claimed from the plaintiffs" (*South Staffordshire Tramway Co. v. Sickness and Accident Assurance Co.* [1891], 1 Q. B. 402). In that case the Court of Appeal decided that if a tramcar was overturned, and forty persons were injured, there were forty accidents, not one. It is usual to insert in policies of insurance against employers' liability, clauses protecting the company against any change in the trade of the employer or his mode of conducting it, and also a proviso obliging him to defend any action brought against him by his workman, if the company requires him so to do, and forbidding his compromising the action or paying any compensation to the workman without the consent of the directors. See EMPLOYERS' LIABILITY.

Accidents, Notice of.—By the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), the proprietors of any railway, tramway, gasworks, canal, harbour, bridge, pier, or other public undertaking, are bound to give notice to the Board of Trade of any accident which causes either the death of any workman in their employ, or prevents his working as usual on any one of the next three working days; and the Board may thereupon direct an investigation to be held into the causes and the circumstances of such accident. See BOARD OF TRADE.

Accommodation Bill.—An accommodation party to a bill of exchange is a person who has signed the bill as drawer, acceptor, or indorser, without receiving value therefor, and *for the purpose of lending his name to some other person* (Bills of Exchange Act, 1882, s. 28 (1)). (The sections cited below are from this Act.) The circumstance that a party has in fact received no value for the bill does not of itself make him an accommodation party (see Byles on *Bills*, 14th ed., p. 450). A bill to which there are one or more accommodation parties is an accommodation bill. The name is sometimes restricted to the commonest example of such bills, in which the acceptor signs for the accommodation of the drawer. It is presumed, in the absence of evidence to the contrary, that the acceptor is the person ultimately liable to pay the bill, and after him the drawer and the indorsers in the order of their indorsements; but evidence is admissible to show that any party, as between himself and a later party, or that the acceptor, as between himself and the drawer, is not so liable, and that as between such parties the bill is an accommodation bill. It makes no difference that a commission, or other consideration, has been paid to the accommodation party for the use of his name (*Oriental Corporation v. Overend, Gurney, & Co.*, 1871, L. R. 7 Ch. 142; 7 H. L. 384), if he has not received value for undertaking to *pay the bill*. An accommodation party ceases to be such if after becoming a party he receives value for the bill, so that, as between himself and the party accommodated, the latter is not ultimately liable to pay it (*Burdon v. Benton*, 1847, 9 Q. B. 843,—there a cross acceptance was subsequently given).

An accommodation party is liable on the bill to a holder for value, whether the latter knew him to be such or not (s. 28 (2)). But since he is, in fact, only a surety for the party accommodated, the holder of the bill, after having notice that this is the case, is bound by the ordinary rules, as to giving time to the principal debtor, and as to surrendering securities, etc., which spring from the relationship of creditor, debtor, and surety (*Oriental Corporation v. Overend, Gurney, & Co.*, *supra*; *Rouse v. Bradford Banking Co.*, [1894], App. Cas. 586). See PRINCIPAL AND SURETY.

He can avail himself of any defence which is available for the party accommodated, for instance, set-off for a debt due to the latter from the plaintiff (*Bechervaise v. Lewis*, 1872, L. R. 7 C. P. 372). Payment by the party accommodated in due course discharges the bill (s. 59 (3)), so that, if it is afterwards reissued, the party accommodated cannot be sued by the holder (*Cook v. Lister*, 1863, 32 L. J. C. P. 121; *Jewell v. Parr*, 1853, 13 C. B. 909. See Chalmers' *Bills of Exchange*, 5th ed., p. 205).

If an overdue bill of exchange is negotiated, it is negotiated subject to any defect of title (or equity attaching to the bill) affecting it at its maturity (s. 36 (2)): "After a long controversy, it now seems settled that mere absence of consideration is not an equity which attaches to a bill (*Sturtevant v. Ford*, 1842, *Man. & G.* 101), but if there be an agreement, express or implied,

not to negotiate an accommodation bill after maturity, the agreement constitutes an equity attaching to it" (*Parr v. Jewell*, 1855, 16 C. B. 684, quoted from Chalmers, 5th ed., p. 117; and see Byles, 14th ed., p. 191).

Presentation for payment or acceptance and notice of dishonour are usually dispensed with, where it is sought to change an accommodation party to a bill, namely, *presentation*, where he has no reason to believe or expect that the bill would be paid if presented, and *notice* without this condition—as regards the drawer, where the drawer or acceptor is not bound as between himself and the drawer to accept or pay the bill; as regards an indorser, where the bill was accepted or made for the accommodation of that indorser (ss. 46 (c) (d); 50 (c) (d)).

The party accommodated is bound to indemnify the accommodation party against his liability upon the bill, and this extends to the costs of actions brought against the latter upon the bill and reasonably defended (*Stratton v. Matthews*, 1848, 3 Ex. Rep. 48; *Hammond v. Bussey*, 1887, 20 Q. B. D. 79). It has been decided that where an indorser, who was an accommodation party, paid the bill without having received due notice of dishonour, he could not recover from the party accommodated (*Sleigh v. Sleigh*, 1850, 5 Ex. Rep. 514), but this case has been questioned (see the judgment of Thesiger, L. J., in *ex parte Bishop*, 1880, 15 Ch. D. 400). In any case it is only where the accommodation party has full knowledge that he cannot be compelled to pay the bill, that he is barred from recovering on the implied contract to indemnify (*Sleigh*, *supra*).

Accommodation (of Passengers and Seamen).—

See SHIPPING.

Accommodation Party.—See ACCOMMODATION BILL.

Accommodation Works.—These works are of various kinds, but "accommodation works" in their general legal acceptation refer to works required to be executed by the company or party authorised to construct a railway.

The exact nature of these works is fully set out in the 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, which is as follows:—

"And with respect to works for the accommodation of lands adjoining the railway,—it is enacted as follows: The company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway: (that is to say,)

"Such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof:

"Also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such land from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the rail-

way, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be:

"Also all necessary arches, tunnels, culverts, drains, or other passages, either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be; and such works shall be made from time to time as the railway works proceed:

"Also proper watering places for cattle where by reason of the railway the cattle of any person occupying any lands lying near thereto shall be deprived of access to their former watering places; and such watering places shall be so made as to be at all times as sufficiently supplied with water as theretofore, and as if the railway had not been made, or as nearly so as may be; and the company shall make all necessary watercourses and drains for the purpose of conveying water to the said watering places:

"Provided always, that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them."

In the interpretation placed upon this section, "lands adjoining the railway" do not include anything beneath the surface (*R. v. Fisher*, 1862, 32 L. J. M. C. 12; 3 B. & S. 191), and the company's only liability as regards "fences" is towards the owners or occupiers of an adjoining close (*Ricketts v. East & West India Dock & Ry. Co.*, 1852, 12 C. B. 160; 21 L. J. C.P. 201). The company are under no liability to maintain fences sufficient to keep cattle off the line under all circumstances, but are bound to use reasonable care towards their passengers (*Burton v. N.-E. Ry. Co.*, 1868, L. R. 3 Q. B. 549). In the proviso the liability of the railway company to make such accommodation works is not released towards the person, whether owner or occupier, who has not agreed to receive compensation, or to whom the company has not paid compensation instead of making the accommodation works. For instance, payment of compensation to the landlord does not release them from their statutory liability to the tenant to make and maintain fences (*Corry v. G. W. Ry. Co.*, 1881, 7 Q. B. D. 322; 50 L. J. Q. B. 386; 44 L. T. 701; 29 W. R. 623).

In addition to the foregoing provision, sec. 69 provides for differences as to accommodation works being settled by justices; and in the event of failure by the company to commence such works, sec. 70 gives the party aggrieved (see AGGRIEVED) power to execute such works himself, the reasonable expenses thereof to be repaid by the company.

Any owner or occupier of lands affected by the railway may make such further works as he may think necessary for the commodious use of his land if agreed to by the company, or, in case of difference, as shall be authorised by two justices (s. 71). Sec. 72 provides that all such accommodation works shall be constructed under the superintendence of the company's engineer, if they so desire. And sec. 73 limits the period within which the company may be required to make any further or additional accommodation works to five years from the completion of the works and the opening of the rail-

way for public use (*Colley v. L. & N.-W. Ry. Co. & G. W. Ry. Co.*, 1880, L. R. 5 Ex. D. 277; 49 L. J. Ex. 575; 42 L. T. 807; 29 W. R. 16).

In addition to the foregoing provisions, the owners and occupiers of lands, and any other persons whose right of way shall be affected (including their respective servants), may cross the railway for the purpose of occupying their lands or the exercise of their rights, until the company have made the accommodation works (s. 74).

Further, there is a penalty imposed by sec. 75 on persons omitting to fasten gates; and lastly, there is a power given to owners and occupiers and other persons to make (subject to certain restrictions and conditions) private branch railways. See BRANCH RAILWAYS.

Accomplice.—A term applied to every *particeps criminis*, i.e. to every person who is in any other way associated with another person in committing or attempting to commit any criminal offence, whether treason, felony, or misdemeanour (Fost., 2nd ed., 341; 3 Stephen, *Hist. Crim. Law*, 229; *R. v. Farler*, 1837, 8 Car. & P. 106; Hawk., P. C., bk. ii. c. 37, s. 7; Mayne, *Criminal Law of India*, 1896, 429–457; and see ABETTOR; ACCESSORY). The term is in practice used chiefly with reference to evidence in criminal cases. An accomplice has always been held to be an admissible witness, at any stage of the prosecution, either for or against his associates in the joint offence, in spite of his interest in securing a conviction in order to obtain pardon or mitigation of punishment (Hawk., P. C., bk. ii. c. 46, ss. 97–100; *R. v. Dodd*, 1777, 1 Leach, C. C., 2nd ed., 141). It was, however, held that the accomplice, if actually convicted or attainted, could not give evidence (Hawk. s. 101); but this disability was taken away as to convicted persons by 6 & 7 Vict. c. 85, s. 1, except perhaps in a case of a person under sentence of death (*R. v. Webb*, 1867, 11 Cox C. C., 113): and as attainder was abolished by the Forfeitures Act, 1870 (33 & 34 Vict. c. 23, s. 1), this exception seems to be now without justification. Where an accomplice is to be called for the Crown, on a promise of pardon or of immunity from prosecution, or of mitigation of punishment, it is the practice either (1) not to include him in the indictment against his associates, or (2) to take his plea of guilty, or otherwise withdraw his case from the jury before calling him (*Winsor v. R.*, 1866, L. R. 1 Q. B. 289, 390); (3) to offer no evidence against him on the indictment, and take an acquittal before calling him (*R. v. Owen*, 1839, 9 Car. & P. 83); or (4) to enter a *nolle prosequi* (*R. v. O'Connell*, 1843, 4 St. Tri. N. S. 936). An accomplice cannot be called for the defence of an associate in crime if included in the same indictment, unless (1) an order for separate trials is made (*R. v. Bradlaugh*, 1883, 15 Cox C. C. 217; *R. v. Payne*, 1872, L. R. 1 C. C. R. 349); or (2) the accomplice has first pleaded guilty or been acquitted for want of evidence. Where a defendant is by statute a competent witness, these rules do not apply. The wife of an accomplice is subject to the same rules as her husband (*R. v. Thompson*, 1872, L. R. 1 C. C. R. 377). An accomplice who satisfies the conditions on which he is allowed to turn Queen's evidence, usually receives a pardon; but until it is given has no legal right to exemption from punishment (*R. v. Garside*, 1834, 2 Ad. & E. 266; 3 Russ on *Crimes*, 6th ed., 642). It is well established practice, but not a rule of strict law, to direct the jury to acquit in cases where the case for the Crown rests on the evidence of an accomplice, unless he is corroborated by independent evidence as to some material fact implicating the accused in the commission of the offence charged (*R. v. Mullins*, 1848, 7 St. Tri. N. S. 1110; *R. v. Stubbs*, 1855, 25 L. J. M. C. 16; *R. v. Boyes*, 1861,

ACCORD AND SATISFACTION

30 L. J. Q. B. 301; *R. v. Gallagher*, 1883, 15 Cox C. C. 291; *In re Meunier* [1894], 2 Q. B. 415, and see other decisions collected and discussed in 3 Russ. on Crimes, 6th ed., 642-653; Arch. Cr. Pl., 21st ed., 319).

Accord and Satisfaction is a defence, whether the cause of action arise out of contract or tort (see *Boosey v. Wood*, 1865, 3 H. L. C. 484, where it was pleaded to an action for libel). As the name indicates, it is constituted by the agreement of the claimant to accept, and of the debtor to pay, or do, something in satisfaction of the cause of action—this is the *accord*; and of the actual payment or execution of the thing agreed upon—this is the *satisfaction*. The reports contain a large number of decisions relative to this defence, many of which are obsolete, now that equity and law are administered together. The following points affecting the substance of the law are still of importance:—

1. There must be satisfaction as well as accord. In other words, what is promised in substitution for the cause of action to be satisfied must be actually rendered (*Cumber v. Wane*, 1718, 1 Stra. 426). It was formerly held as a deduction from this rule that a fresh promise could not operate as a discharge, but “the rational distinction seems to be, that if the *promise* be received in satisfaction, it is a good satisfaction, but if the *performance*, not the *promise*, is intended to operate in satisfaction, there will be no satisfaction without performance” (1 Smith’s L. C., 10th ed., p. 336), and this is the modern rule (*Hall v. Flockton*, 1849, 14 Q. B. 380; *Evans v. Powis*, 1847, 1 Ex. Rep. 601; *Edwards v. Hancher*, 1875, 1 C. P. D. 111).

2. “Payment of a lesser sum on the day (it would, of course, be the same after the day), in satisfaction of a greater, cannot be any satisfaction for the whole”: *per* Lord Selborne in *Foakes v. Beer*, 1884, 9 App. Cas. 605, at p. 612, where this rule, known as the “rule in *Cumber v. Wane*,” which had previously been much criticised, was upheld and applied. If the cause of action is for an unascertained sum or for a disputed debt, the rule does not apply, and an agreement to accept a sum certain, smaller than the amount claimed in satisfaction, would be binding (*Wilkinson v. Byers*, 1834, 1 Ad. & E. 106; and *Miles v. New Zealand Co.*, 1885, 32 Ch. D. 266). See COMPROMISE.

The reason assigned in modern times for the rule is, that a promise to waive the unpaid part of the debt is *nudum pactum*, because it is made without consideration. It follows that the promise or performance of something different from, not being merely a part of, what would have been due under the obligation discharged by the accord and satisfaction, is binding, for the Courts will not consider the adequacy of the consideration for a contract (*Curler v. Clark*, 1849, 3 Ex. Rep. 375). “The gift of a horse, hawk, or robe, etc., in satisfaction, is good; for it shall be intended that a horse, hawk, robe, etc., might be more beneficial to the plaintiff, in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction” (*Pinnell’s Case*, 44 Eliz., 5 Co. Rep. 117 a). So the agreement of a number of creditors with the debtor that each will take a composition for his debt (*Good v. Cheeseman*, 1831, 2 Barn. & Adol. 328; *Slater v. Jones*, 1873, L. R. 8 Ex. 186) will, if given or made, and agreed to be taken or accepted, as satisfaction, be effective to discharge their several debts; and the contract of one partner to discharge the debt of his firm, if his sole liability has been accepted by the creditor, is a defence to an action by the creditor against the other partners (*Thompson v. Percival*, 1834, 5 Barn. & Adol. 925). The most important example in practice, of accord and

satisfaction, is the payment of a smaller sum by a negotiable instrument. This will be effective (*Sibree v. Tripp*, 1846, 15 Mee. & W. 23; *Bidder v. Bridges*, 1887, 37 Ch. D. 406) if the bill or note is actually given as satisfaction, and accepted as such. If (as in *Day v. McLea*, 1889, 22 Q. B. D. 610) a cheque is sent by the debtor "in full of all demands," but is kept and applied by the creditor "on account," the balance of the debt is recoverable.

Where an actual agreement to take a smaller sum is not binding, under "the rule in *Cumber v. Wane*," *supra*, it follows that a full receipt signed by the creditor, which is merely evidence of such an agreement, and, not being a deed, does not operate as an estoppel against the creditor, carries the matter no further (*Foster v. Dawber*, 1851, 6 Ex. Rep. 839). So, an account stated (*q.v.*) of ascertained, overdue, and undisputed amount, showing a smaller sum to be due than the true balance, is not an accord and satisfaction for the difference (*Perry v. Attwood*, 1856, 6 El. & Bl. 691), but it will be such if any of the items are not of the character described (*Callander v. Howard*, 1850, 10 C. B. 290).

3. A debt due upon a bill of exchange or promissory note can now be discharged by an absolute and unconditional renunciation of his rights by the holder, if the renunciation is in writing, or the bill or note is delivered to the acceptor or maker (Bill of Exchange Act, 1882, ss. 62 and 89).

4. Accord and satisfaction of a debt by a third person will release the debtor, if made on his behalf, and ratified by him either before it is made (*Simpson v. Eggington*, 1856, 10 Ex. Rep. 845) or subsequently before the transaction is rescinded by the third person (*Walter v. James*, 1871, L. R. 6 Ex. 124). It has been suggested that the satisfaction may be effected without the ratification (see *per* Willes, J., in *Cook v. Lister*, 1863, 13 C. B. N. S., at p. 594; and Pollock on *Contracts*, 6th ed., p. 453), but the law appears to be otherwise (see 1 Smith's L. C., 10th ed., p. 338). Possibly, in the absence of a repudiation of the act of the third party by the debtor, the ratification should be presumed (*Cook v. Lister*, *supra*; *London and County Bank v. London and River Plate Bank*, 1888, 21 Q. B. D. 535). "In the absence of evidence to the contrary, we may presume that a person accepted an offer which was for his benefit" (*per* Mellish, L. J., in *Ex parte Lambton*, 1875, L. R. 10 Ch., at p. 416). As to an agreement to discharge the debtor and substitute a third person, see NOVATION.

5. An accord, though not under seal, or even in writing, and satisfaction is a defence to an action for breach of covenant (Judicature Act, 1873, s. 24; *Steeds v. Steeds*, 1889, 22 Q. B. D. 537).

6. Accord with, and satisfaction of, one of several joint creditors afforded a defence against all, without proof that he had authority to accept it on behalf of his co-creditors (*Wallace v. Kelsall*, 1840, 7 Mee. & W. 264), at law; but in equity, the rule of which now prevails, if the creditors were interested as tenants-in-common (which, in the absence of evidence, is presumed to be the case, see TENANCY IN COMMON), it operates only to satisfy the share in the debt of the creditor with whom the accord is made (*Steeds v. Steeds*, 1889, 22 Q. B. D. 537). Accord and satisfaction made by one of several debtors, whether they be jointly or severally liable, discharges the debt as against all (*Nicholson v. Revill*, 1836, 4 Ad. & E. 675).

7. Until satisfaction is made, the original cause of action is unaffected by the accord, and may therefore become barred by the Statutes of Limitation (*Reeves v. Hearn*, 1836, 1 Mee. & W. 323). On the other hand, when the accord and satisfaction are complete, the original cause of action is determined.* So that, for example, the creditor can have no

claim for unforeseen danger arising out of it (*Nicklin v. Williams*, 1854, 10 Ex. Rep. 259).

8. The accord need not be made or acknowledged in writing whether its subject-matter fall within the Statute of Frauds or not (*Lavery v. Turley*, 1860, 6 H. & N. 239).

9. The proper method of discharging a cause of action, where no fresh consideration is to be given, is by a release under seal. See RELEASE.

10. The defence of accord and satisfaction, and the rules stated above, are appropriate only to causes of action. "It is competent for both parties to an *executory* contract (see CONTRACT), by mutual agreement, without any satisfaction, to discharge the obligation of a contract" (*per* Parke, B., in *Foster v. Dacber*, 1851, 6 Ex. Rep. 839; *Goss v. Lord Nugent*, 1834, 5 Barn. & Adol. 65), the release of each party by the other from the obligation remaining to be performed by him affording the consideration for the agreement.

Account, Action of.—An action lay at common law against a bailiff or receiver, or against a merchant at the suit of a merchant in respect of dealings together as merchants, for not rendering a reasonable account of profits. By the statute, 4 Anne, c. 16, s. 27, an action of account might be brought by one joint-tenant or tenant in common against the other, as bailiff, for receiving more than his just share or proportion (*Henderson v. Eason*, 1851, 17 Q. B. 701). But in the face of the extensive jurisdiction of the Courts of equity in all matters of account, these common law actions become practically obsolete. And now, in either Division of the High Court (*York v. Stowers*, W. N. 1883, p. 174), a plaintiff may indorse his writ with a claim for an account (Order 3, r. 8), and apply for an order under Order 15, r. 1. Unless the defendant can show that there is some preliminary question to be tried, the account will then be taken, either by a chief clerk or a district registrar (*In re Bowen*, 1882, 20 Ch. D. 538), or by a special or official referee under either section 13 or 14 of the Arbitration Act, 1889. It will be taken as a rule in the manner prescribed in rr. 3 to 9 of Order 33; but see *In re Taylor*, 1890, 44 Ch. D. 128; and *Seton*, vol. ii. ch. 43, 5th ed., pp. 1149–83. And where no claim for an account is indorsed on the writ, still, at any stage of the proceedings, in any cause or matter, the Court or a judge may direct any necessary accounts to be taken, notwithstanding that there may be some further relief sought for, or some special issue still to be tried (Order 33, r. 2). See ACCOUNTS, ACTION FOR; ACCOUNTS AND INQUIRIES.

Account, Audit of.—See AUDITOR.

Account Books.—See BANKRUPTCY.

Account Current.—See BANKER.

Account Duty.—This duty was established by the Customs and Inland Revenue Act, 1881, s. 38, which was amended by the Customs and Inland Revenue Act, 1889, s. 11; but by the Finance Act, 1894, s. 1, estate

duty was substituted instead, except (s. 21 (1) (2)) in the case of personal property settled by a disposition made by a person dying before the 1st August 1894, in respect of which property account duty has been paid or is payable, unless in either case the deceased was at the time of his death, or since the disposition took effect, competent to dispose of the property, or except in the case of a person who died before the 1st August 1894, in which case account duty should continue to be payable. Account duty will therefore become obsolete. It was imposed to subject to stamp duty personal property passing on death by way of *donatio mortis causa*, joint investment, or voluntary settlement, or under a policy of insurance kept up for a donee, or passing by a voluntary disposition, *inter vivos*, within a certain time from death.

By the Act of 1881, s. 38 (1), stamp duties at the like rates as are by this Act charged on affidavits and inventories, shall be charged and paid on accounts delivered of the personal or moveable property, to be included therein according to the value thereof. The rates are enacted by sec. 27 :—

Where the estate is above £100
and not above £500 :

Duty rate of £1 for every £50, and
for any fractional part of £50.

Where the estate is above £500
and not above £1000 :

Duty rate of £1, 5s. for every
£50, and for any fractional part
of £50.

Where the estate is above
£1000 :

Duty rate of £3 for every sum of
£100, and for any fractional
part of £100.

Sec. 26 provides that these stamp duties shall be under the management of the Commissioners of Inland Revenue, who shall have all powers for their collection and recovery vested in them for the collection and recovery of any stamp duties.

The property charged is described in sec. 38 of the 1881 Act, as amended by sec. 11 of the 1889 Act:—

(a) "Any property taken as a *donatio mortis causa* made by any person dying on or after the 1st June 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift, *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made [three months by Act of 1881, now by Act of 1889] twelve months before the death of the deceased"; [added by the Act of 1889] "and the said description of property shall include property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

(b) "Any property which a person dying on or after such day, having been absolutely entitled (see ABSOLUTELY ENTITLED) thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person"; [by the Act of 1889] this description of property shall be construed as if the expression "to be transferred to or vested in himself and any other person," included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person.

(c) "Any property passing under any past or future voluntary settlement made by any person dying on or after such day, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved, either expressly or by implication, to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property; [and by the Act of 1889] this description of property shall be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer; and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression 'such property,' wherever the same occurs, included the proceeds of sale thereof."

Sec. 11 of the Act of 1889 further provides that the charge under sec. 38 shall extend to money received under a policy of assurance effected by any person dying on or after the 1st June 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

Under sec. 38 (3), if stamp duty has been previously paid on a voluntary settlement, the amount of such duty is to be returned to a person delivering an account duly stamped, but this relaxation of duty has been abolished, after the 1st June 1889, by the 1889 Act.

No stamp duty is imposed on property under £100, and under sec. 41, where account duty has been paid, the duties of £1 per centum imposed by the Stamp Act, 1815, and by the Succession Duty Act, 1853, are not payable.

Under sec. 39, any person who in any capacity acquires possession or assumes the management of any property comprehensible under an account, shall, on retaining or disposing of the property, and in any case within six calendar months from the deceased's death, deliver to the Commissioners of Inland Revenue an account of such property, duly stamped, and (s. 40) on neglect by any person required to deliver an account, he shall be liable to pay double duty.

The stamps may be denoted by impressed stamps (adhesive stamps are not given), which can be obtained from Somerset House or any Inland Revenue office, or at money post-offices outside the metropolitan postal district.

Forms of account may be found in Mr. Gossett's *Practical Guide to Account Stamp Duty*. They can be obtained from the Legacy Duty Office, Somerset House, and the Legacy Duty Office, Dublin, or any Inland Revenue office. The account, when filled up, must be verified on oath before any officer authorised by the Commissioners, or a Commissioner of the Supreme Court, and must then be presented at the Legacy Duty Office, or forwarded to the Comptroller of Legacy Duties, Somerset House: and every instrument affecting the property, or a copy of it, should be sent for examination, but these will be returned. The account, if satisfactory, will be returned, with the amount of the duty to which it is liable stated on it. The account should then be stamped, and sent, with a copy, to Somerset House, and the copy will be returned with a certificate of payment; in the case of a settlement, if desired, the certificate will be placed on the settlement.

A valuation for account duty is exempted from the stamp duty imposed by the Stamp Act, 1891 (see 1st schedule, Appraisalment). The duty is

chargeable on the value of the property at the date of the account, including accrued income between the date of the death and the time of delivering the account. If the property be so disposed of as to come within the jurisdiction of British Courts, it is chargeable whatever its locality; and any property locally situated in the United Kingdom is also chargeable on the death of a person domiciled elsewhere. Effects, not consisting of money or securities for money, and not sold, are to be valued at the time the account is rendered, when inventories and proper valuations thereof will be required; stocks, shares, etc., are to be valued at the medium price of the day on which the account is dated. When property has been undervalued, a further stamped account must be delivered; if the duty has been overpaid, though there is no provision in the Act, the Commissioners of Inland Revenue authorise repayment. Application will have to be made at the Legacy Duty Office; and an affidavit stating the circumstances, and the original documents, must accompany the application.

Under sec. 28 of the Act of 1881, deduction is allowed for funeral expenses and debts in the case of probate duty; there is no such allowance prescribed in the case of account duty, but in practice it is allowed. Account duty may be compounded for, and in this case application must be made to the Comptroller of Legacy Duties.

The cases affecting *donatio mortis causa*, voluntary dispositions and settlements, and on the Acts of 1881 and 1889, are numerous. For these refer as follows:—

1. *Donatio mortis causa*.—Norman's *Death Duties*, pp. 134–6; Gossett's *Practical Guide*, pp. 14–18; Williams on *Executors*, 9th ed., p. 681.

2. *Voluntary Dispositions inter vivos*.—May on *Fraudulent Conveyances*, 2nd ed.; Norman, p. 136; Gossett, pp. 18–31; *A.-G. v. Worrall* [1895], 1 Q. B. 99; 64 L. J. Q. B. 141; 71 L. T. 807. There being a mortgage debt owing to a father, the mortgaged estates were, in consideration of £575 paid by the son to the mortgagors, and of his covenant with the father, conveyed by the father and mortgagors to the son in fee, the mortgage debt being released, and the son covenanting to pay an annuity to the father: held the deed was a gift of the mortgage debt, and account duty was payable.

An absolute gift to the Salvation Army of £1000 and £500 within twelve months of the testator's death was held subject to account duty (*A.-G. v. Booth* [1891], 63 L. T. 356).

3. *Joint Investment*.—Norman, p. 138; Gossett, pp. 31–40; *A.-G. v. Ellis* [1895], 2 Q. B. 466; 73 L. T. 350. Husband and wife purchased stock in their joint names, out of moneys contributed equally, on agreement that survivor should be entitled to the stock: held, notwithstanding the consideration, duty was payable.

4. *Voluntary Settlement*.—Norman, p. 139; Gossett, pp. 40–103; *Crossman v. R.* 1886, 18 Q. B. D. 256. Transfer of shares in a partnership by a father to sons as from a certain date or the father's death, which should first happen, in consideration of a covenant to pay interest to the father and annuities to other persons: held to be a voluntary settlement. Children by a first marriage are volunteers in a settlement on the second marriage (*A.-G. v. Jacobs Smith* [1895], 2 Q. B. 341; 64 L. J. Q. B. 605; 72 L. T. 714). Annuity to a widow of one of the partners under a partnership agreement: held property passing under a voluntary settlement (*A.-G. v. Wendt* [1895], 73 L. T. 255; 65 L. J. Q. B. 255). Account duty is payable rateably by successive appointees (*In re Shaw* [1895], 1 Ch. D. 343; 64 L. J. Ch. D. 283; 71 L. T. 873).

Three Scottish cases and one Irish case on the Act are given in the *Weekly Notes*, 1896, pp. 101, 118, 132, 141, viz. cases of *Lord Advocate v. McCourt*, *v. Wilson*, and *v. Robertson*, and the *Attorney-General for Ireland v. Baron Rathdonnell*.

The Act of 1889 was held to be retrospective, and to be applied to property passed, and for which proceedings were taken before the Act was passed (*A.-G. v. Theobald*, 1890, 24 Q. B. D. 557).

For other cases, see Green's *Encyclopædia of Scots Law*, and Mews' *Digests* (*Revenue, Account Duty*).

5. *Policy of Insurance kept up by Donor*.—The Act does not apply to a policy assigned to a donee and thereafter wholly kept up by him (*Lord Advocate v. Robertson*, 22 Rettie, 568 [1895], and W. N. [1896], 132).

See ESTATE DUTY.

Account, Settled.—A settled account is a statement of the accounts between two parties, which is agreed to and accepted by both as correct. It must be in writing; and it must be *final*, that is, it must show clearly what balance is due, or that no balance is due. An informal release of all demands may be a settled account. The fact that it is stated with the qualification "errors excepted" will not prevent its being a good settled account. It is not enough for the accounting party merely to deliver his account; there must be some evidence that the other party accepted it as correct. But such acceptance need not be express; contemporaneous or subsequent conduct may amount to a sufficient acquiescence (*Clark v. Glennie*, 1820, 3 Stark. 10; *Irvine v. Young*, 1823, 1 Sim. & St. 333). The fact that the accounting party delivered up his vouchers to the other party is evidence that both regarded the settlement as final.

The plea of a settled account is a good defence to a claim for an account (see ACCOUNT, ACTION OF; ACCOUNTS, ACTION FOR); and if coupled with an allegation that the balance shown by such account had before action been paid to the plaintiff, it is also a good defence to an action for money received by the defendant to the use of the plaintiff. In reply to such a plea, however, the plaintiff may seek to set aside the settlement, by proving that the account contains errors of such a kind, or to such an extent, that it would be inequitable to hold him bound by it. He must in his pleading specify the errors upon which he relies: and if he contends that such errors were made fraudulently, this must also be clearly stated. If he succeeds in proving fraud, the account will be wholly set aside, and the defendant must account *de novo* for every penny which he has received. The same result will follow where there is no fraud, if a considerable number of errors is shown in the account. Indeed, if the parties stand to each other in a fiduciary relationship (*e.g.* as solicitor and client, trustee and *cestui-que trust*, guardian and ward), the plaintiff need only prove one "grave or substantial error," and the account will be taken as though there had been no settlement (*per* Davey, L. J., in *In re Webb* [1894], 1 Ch. pp. 83–86). Where there is no such relationship, and no fraud, and the plaintiff cannot prove any large number of errors, he will probably only obtain leave to "surcharge and falsify," as it is called. Proof of one serious error will entitle him to this. It means that the account stands for what it is worth; but that either party may try and amend it, either by adding items in his favour which were wrongly omitted (that is, surcharging), or by striking out items against himself which were wrongly inserted (that is, falsifying). Whether an account shall be opened, or leave

only given to surcharge and falsify, is a matter entirely in the discretion of the Court; and whenever one party is allowed to surcharge and falsify, the other may do so too (see *Williamson v. Barbour*, 1878, 9 Ch. D. 529; *Gething v. Keighley*, *ib.*, 547). See ACCOUNTS STATED.

Accounts.—See PARTNERSHIP; PATENTS.

Accounts and Inquiries.—Accounts and inquiries are the machinery employed by the High Court for the purpose of obtaining such information as to the rights and interests of the parties to an action, or the questions arising therein, as may be requisite for either giving or working out the judgment. Under the Consolidated Orders of the Court of Chancery (Orders 20 & 35, r. 19), that Court could direct preliminary accounts and inquiries at any time after appearance of the defendant to the bill of complaint (under the former practice), provided that all parties would be bound by them, and, in general, that they were such as would have been directed at the hearing (*Meinertzhagen v. Davis*, 1839, 10 Sim. 289), and not such as would involve the decision of the questions at issue in the cause; and the Court could, where it appeared expedient in the prosecution of a decree or order, direct further accounts or inquiries to be taken or made, not being inconsistent with the decree or order already made (see cases cited in Morgan, *Chancery Acts and Orders*, 6th ed., p. 397). These orders have been repealed, and their provisions generalised, by the *Rules of the Supreme Court* (Order 33, r. 2), under which the High Court is enabled at any stage of the proceedings in a cause or matter, to direct any necessary inquiries or accounts, although there may be some special or further relief sought for, or some special issue to be tried, as to which the cause or matter must proceed in the ordinary manner. Only subsidiary accounts and inquiries will be directed under the above rule, which does not authorise the sending of the whole case to be tried in chambers (*Garnham v. Skipper*, 1885, 29 Ch. D. 566). An application under the rule is usually made by summons. By sec. 34 of the Judicature Act, 1873, the taking of accounts is assigned to the Chancery Division of the High Court; but under R. S. C. (Order 15), where the indorsement on a writ of summons is for an account, or involves taking an account, if the defendant fails to appear, or, after appearance, to satisfy the Court that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions usual in the Chancery Division in similar cases, is to be forthwith made. This rule extends to the Queen's Bench Division, but as that Division has not the requisite machinery for taking complicated accounts, an action involving such accounts will be transferred to the Chancery Division (*Leslie v. Clifford*, 1884, 50 L. T. 590), except in simple cases (*York v. Stowers*, W. N. 1883, 174). An application under Order 15 is made by summons, supported by an affidavit stating concisely the grounds of the plaintiff's claim, and, where the defendant has failed to appear, an affidavit of service of the writ and summons, and certificate of non-appearance, and of filing of the summons, if it has been so served. Accounts and inquiries directed by the Court are prosecuted in chambers (see R. S. C., Orders 55, 28–64, and *In re Taylor, Turpin v. Pain*, 1890, 44 Ch. D. 128). Under the Arbitration Act, 1889, s. 14, where a prolonged examination of documents is involved, or the question in dispute consists wholly or in part of matters of account, the cause, or any question or

issue of fact arising therein, may be referred to a special referee or arbitrator, or an official referee. See ARBITRATION.

Accounts, Falsification of.—This offence stands in a somewhat perplexing relation to forgery, embezzlement, and obtaining money by false pretences (*q.v.*). Making a false original entry in a book or account is not forgery at common law or by statute (*In re Windsor*, 1865, 34 L. J. M. C. 163), but is good evidence of embezzlement, and if money is obtained by means of such entry it is obtained by false pretences. The offence is now in certain cases a statutory misdemeanour.

1. In 1857 falsification of books and accounts by company officials was first made punishable by 20 & 21 Vict. c. 54, s. 7.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 83), directors, managers, public officers, or members of a body corporate or public company, who, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security of the corporation or company, make or concur in making a false entry, or omit or concur in omitting any material particular, in any book of accounts or other document, are guilty of a misdemeanour, punishable by penal servitude for three to seven years, or imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 96, ss. 75, 83; 54 & 55 Vict. c. 69, s. 1). The offence is not triable at Quarter Sessions (*q.v.*) (24 & 25 Vict. c. 96, s. 87). Liability to conviction for this offence does not entitle the offender to refuse to answer questions in any civil proceeding (24 & 25 Vict. c. 96, s. 85), but his answers are not admissible in evidence, on a prosecution under s. 83; see Bankruptcy Act, 1890 (53 & 54 Vict. c. 71, s. 27); *R. v. Godheim* [1896], 2 Q. B. 260. The effect of all these sections was discussed in *R. v. Bottomley* and *R. v. Balfour*, but there is no reported case as to their scope, except *re Arton* (No. 2) [1896], 1 Q. B. 509.

A similar provision to that of s. 83 of the Larceny Act, 1861, is made by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 166, as to mutilation or falsification of books or documents of a company in a compulsory or voluntary liquidation, by a director, officer, or contributory. Prosecution by the liquidator at the cost of the company may be directed or sanctioned by the Court (25 & 26 Vict. c. 89, ss. 167, 168).

2. Clerks, officers, servants, or persons employed in that capacity, are guilty of a misdemeanour if they do any act such as is described under 1, with reference to any writing book, etc., belonging to or in the possession of their employer, or received by them for or on behalf of the employer. The punishment is the same as for No. 1, but the offence can be tried at Quarter Sessions (Falsification of Accounts Act, 1875, 38 & 39 Vict. c. 24, s. 1). (For definition of clerk, etc., see EMBEZZLEMENT.) It is not necessary in the case of offence 2 to allege or prove intent to defraud a particular person (24 & 25 Vict. c. 96, s. 67; 38 & 39 Vict. c. 24, s. 2). The offences can be committed by handing to an innocent agent, for insertion in the account, a note of a false entry to be made (*R. v. Byatt*, 1884, 15 Cox C. C. 564).

3. Falsification of public accounts by a servant of the Crown seems to have been a misdemeanour both at common law (*R. v. Bembridge*, 1783, 22 St. Tr. 1), and under 38 Hen. VIII. c. 39, ss. 48, 49, and 50 (Geo. III. c. 59).

4. There are a great number of Statutes making falsification of certain accounts and documents criminally punishable, *e.g.* The Friendly Societies

Act, 1896 (59 & 60 Vict. c. 25, s. 88); the Industrial and Provident Societies Act, 1894 (56 & 57 Vict. c. 39, s. 65); the Building Societies Act, 1894 (57 & 58 Vict. c. 47, s. 22); and see *Official Index to Statutes*, ed. 1896, CRIMINAL LAW, 6 (a) (2).

Accounts Stated.—An account stated is an admission of a sum of money being due from one party to another, from which a promise to pay the amount is implied in law (*Irving v. Veitch*, 1838, 3 Mee. & W. 106). In order to constitute an account stated there must be a statement of some certain amount of money being due, which statement must be made by the debtor or his agent, either to the creditor himself, or to some agent of his (*Hughes v. Thorpe*, 1840, 5 Mee. & W. 656, 667). The account may be stated orally or in writing, and it need not contain any express agreement to pay, as such agreement will be implied. If the account is stated concerning a debt which is barred by the Statute of Limitations (see STATUTE—BARRED DEBTS; LIMITATION), it must, in order to enable it to be sued upon, be in writing, signed by the party chargeable therewith (9 Geo. IV. c. 14, s. 1; *Jones v. Ryder*, 1838, 4 Mee. & W. 32). An account stated in writing need not be stamped, unless it is in the form of a bill of exchange or promissory note, in which case it must be duly stamped as such, as otherwise the person taking or receiving it is not entitled to recover thereon, or to make it available for any purpose whatever (54 & 55 Vict. c. 39, s. 38 (1); *Green v. Davies*, 1826, 4 Barn. & Cress. 235; *Ashling v. Boon* [1891], 1 Ch. 568). An I O U is evidence of an account stated, and may be sued upon as such (*Buck v. Hurst*, 1866, L. R. 1 C. P. 297). An account stated is not necessarily final or binding between the parties to it, for it may be shown to have been stated by mistake (*Thomas v. Hawkes*, 1841, 8 Mee. & W. 140; *Perry v. Attwood*, 1857, 6 El. & Bl. 691; 25 L. J. Q. B. 408); or in respect of a future or contingent debt (*Lemere v. Elliott*, 1860, 6 H. & N. 656; 30 L. J. Ex. 350); or for a debt for which there was no consideration (*French v. French*, 1841, 2 Man. & G. 644; *Kennedy v. Brown*, 1863, 13 C. B. N. S. 677; 32 L. J. C. P. 137); or for a debt in respect of which there was a failure of consideration (*Jacobs v. Fisher*, 1845, 1 C. B. 178; *Wilson v. Wilson*, 1854, 14 C. B. 616); or for which the consideration was illegal (*Rose v. Savory*, 1836, 2 Bing. N. C. 145); or for which the person making the admission was not liable (*Petch v. Lyon*, 1846, 9 Q. B. 147).

By sec. 1 of the Infants' Relief Act, 1874, 37 & 38 Vict. c. 62, all accounts stated with infants are absolutely void.

An account stated forms a distinct cause of action, and, if sued upon as such, it should be alleged with particulars in the statement of claim, but if only relied upon by way of evidence or admission of any other cause of action which is pleaded, it should not be alleged in the pleadings (R. S. C., Order 20, r. 8).

Accountable Receipt.—A written acknowledgment of the receipt of money or goods to be accounted for. The forgery of an accountable receipt, or any endorsement on, or assignation of, it, with intent to defraud, is a felony punishable by penal servitude or imprisonment (24 & 25 Vict. c. 98, s. 23). A scrip certificate of a railway company is not an accountable receipt (*Clark v. Newsom*, 1846, 1 Ex. Rep. 131); a pawnbroker's ticket is an accountable receipt for goods (*R. v. Fitchie*, 1857, Dears. & B.

C. C. 66175). An entry in a bank pass-book of the receipt of money is an accountable receipt (*R. v. Moody*, 1862, L. & C. 173).

Accountant.—It is open to anybody to be—at least in name—an accountant, for accountants have no special legal status. They differ from members of the legal and medical professions in this respect, namely, that there is no special qualification which the law requires to enable a man (or woman) to practise accountancy.

Whilst many Acts of Parliament relating to public companies, public authorities, etc., provide that accounts shall be kept in manner specified, and shall be audited, it is quite the exception to find that the audit must be the work of an accountant (see for example the Companies Act, 1879, s. 7, which deals with banking companies' accountants; Metropolis Water Act, 1871, ss. 37 to 42; Friendly Societies Act, 1875, s. 14; Industrial and Provident Societies Act, 1893, s. 13). The Companies' Clauses Act, 1845, sec. 108, provides that the auditor may employ an accountant, but this employment is not compulsory, nor need the accountant be a member of any professional society of accountants; and see Companies Act, 1862, table A, clause 93. The Building Society Act, 1894, sec. 43, provides that one at least of the auditors of the society shall be "a person who publicly carries on the business of an accountant." And by statute, made under sec. 11 of the Universities of Oxford and Cambridge Act, 1877, one of the auditors of the accounts of an Oxford College must be either "a professional accountant, carrying on business in London and Westminster, or a person conversant with accounts, approved by the Permanent Secretary to Her Majesty's Treasury." The words, "a person who publicly carries on the business of an accountant" and "a professional accountant carrying on business," have not yet received judicial interpretation. Probably it is unnecessary that the auditor should be a member of any recognised professional institute or society; on the other hand, a person whose habitual business is solely or to a considerable extent that of accountancy, would alone be qualified for appointment as the accountant-auditor of a building society or of an Oxford college. Under sec. 4 of the Building Societies Act, an accountant may be appointed by the Registrar of Friendly Societies, to inspect the books of the society and to report thereon.

The chief business of an accountant is the investigation and auditing of accounts; but, in addition, accountants act as bankruptcy trustees, liquidators, and receivers. In this work they have no monopoly. Any "fit person, whether a creditor or not," may be a trustee in bankruptcy (Bankruptcy Act, 1883, s. 21); any person appointed by the Court (Companies Act, 1890, s. 6), or, in voluntary liquidation, selected by the company (Companies Act, 1867, s. 133), may be a liquidator. Although accountants are not obliged to be members of any recognised society, in fact the greater number of professional accountants belong to one of two institutions. These are, the Institute of Chartered Accountants, and the Society of Accountants and Auditors.

The Institute of Chartered Accountants in England and Wales was incorporated by royal charter on 11th May 1880. It is in effect an amalgamation of several older societies of accountants, and the charter was given in recognition of the great and increasing importance of accountants, and in order to "secure for the community the existence of a class of persons well qualified to be employed in the responsible and diffi-

cult duties often devolving upon public accountants." The Institute is a body corporate with perpetual succession, and is governed by a council of not more than forty-five members. The members are Fellows or Associates of the Institute, and are entitled to the use of the initials F.C.A. or A.C.A. They may not follow any business or occupation other than that of a public accountant, or some business which, in the opinion of the council, is incident thereto or consistent therewith. As regards admission to the Institute, persons who have been for ten years continuously in practice as public accountants need not pass examinations. But, with this exception, those who desire to be members of the Institute must generally be articulated to a public accountant for a period, varying, with the circumstances, from three to five years, and must pass certain examinations. The Society of Accountants and Auditors is a company incorporated in 1885, under sec. 23 of the Companies Act, 1862, and is licensed by the Board of Trade to omit the word "limited" from its title. No examination is necessary for the original members, nor need those who were in practice on 31st December 1895 pass examinations; in other cases, membership of the society is obtained only after examinations have been satisfactorily passed. Public accountants, public accountants' principal clerks, and official accountants in the employ of the Government, or of bankers, corporations, public bodies, or limited companies, are eligible for membership; accountants' clerks may be student members of the society.

Accountants of all kinds are entitled to charge for their services, the fees being fixed by arrangement, or, in the absence of arrangement, a reasonable fee will be payable to them. They must do their work with such care and skill as would reasonably be expected of persons who hold themselves out as able to do the class of work undertaken by them (see NEGLIGENCE). Bills have been introduced into the House of Commons to render accountancy to a certain extent a close profession, and to give accountants a legal status. The bills have not progressed, and an immediate change in the law is improbable. See further under AUDITORS. [The history of accountants is dealt with in an interesting address by Mr. F. Whinney, delivered at a meeting of the Institute of Chartered Accountants, held on 22 June 1887.]

Accountant-General. — Prior to the Court of Chancery (Funds) Act, 1872, 35 & 36 Vict. c. 44, there were two officials with this title; one in the Court of Chancery, the other in the Court of Exchequer.

Until 1725 the Masters in Chancery had charge of funds in Court, in suits referred to them; and the Usher, in suits not so referred; holding them for distribution according to orders of Court; and in the meantime employing them for their own use. When the South Sea Scheme collapsed in 1720, five Masters were found to be in default for upwards of £100,000 (*Report of the Chancery Funds Commission*, 1864). Under s. 3 of 12 Geo. I. c. 32, in 1725, an accountant-general was appointed by the Court to manage the suitors' funds, which had now been deposited in the Bank of England, in such manner as had been or should be prescribed by order. In 1820, 1 Geo. IV. c. 35, an accountant-general, with similar duties, was created for the Court of Exchequer, on its Equity side, to take the place of the deputy-remembrancer.

The above-mentioned Act of 1872 abolished both offices, and appointed Her Majesty's paymaster-general in their stead.

By the Supreme Court of Judicature (Funds) Act, 1883, 46 & 47 Vict.

a. 29, one accounting department, the Supreme Court Pay Office, was established for all the Courts and divisions thereof, and their funds directed to be placed to the account, or credit, of the paymaster-general, on behalf of the Supreme Court. See PAYMASTER-GENERAL.

Accountants of the Crown.—Public officers who receive or collect public moneys, and are bound to account therefor into the Exchequer, in manner prescribed by statute, or Treasury regulations made thereunder. As Crown debtors the special remedies of the Crown for the recovery of its debts are available against them, in case of default. See CROWN DEBTS.

The Exchequer and Audit Departments Act, 1866, 29 & 30 Vict. c. 39, defines "principal accountants" as those who receive issues, directly, from the accounts of Her Majesty's Exchequer at the Banks of England and Ireland; and "sub-accountants" as those who receive advances by way of imprest (that is, for expenditure on specified objects) from principal accountants, or who receive fees, or other public moneys, through other channels.

The most important of the principal accountants are the Paymaster-General, to whose account at the Bank of England, or Ireland, moneys voted by Parliament, or charged for the Consolidated Fund services, are transferred on the orders of the Treasury; and the officials of the various departments to whose accounts the necessary sums for public services are credited, and for which they become responsible. See PAYMASTER-GENERAL.

The sub-accountants are the collectors of the various branches of revenue, and receivers of public moneys, who may be required by the Treasury to render accounts to the comptroller and auditor-general.

The modes of accounting, the manner of auditing, and other provisions relating to both classes of public accountants, are contained in the Acts 39 & 40 Geo. III. c. 54; 50 Geo. III. c. 59; 29 & 30 Vict. c. 39; and 54 & 55 Vict. c. 24, s. 1.

[See also Anson, *Law and Custom of the Constitution*, part ii. pp. 181, 326, 340-343.]

Accredit, in international law, is to furnish the envoy of a State with papers called credentials or LETTERS OF CREDENCE (*q.v.*), certifying his public character, and insuring his reception with the deference due to him in such capacity.

Accretion.—This word has reference primarily to the principle whereby land formed gradually and imperceptibly by the action of water goes to the owner of the adjacent soil, such newly-formed land being said to *accrete* to him, or, in other words, become his property. See ALLUVION.

The word is also applied to the state of circumstances which arises when a person having no right, or only an imperfect right, of property, makes a grant, and subsequently has his right perfected. So long as his right is imperfect, his grantee can be in no better position than himself, but the instant his right becomes perfected, the Latin maxim applies, *Jus superveniens auctori accrescit successori*, i.e. the act in the law whereby the title of the person making the grant becomes perfect serves also to validate the title of his grantee. The former will then be estopped from denying his grant

(see **ESTOPPEL**), or, as it has been expressed, "the interest, when it accrues, feeds the estoppel." See the leading case, *Doe d. Christmas v. Oliver*, 1829, 5 Man. & R. M. C. 202.

Accroaching.—Old French *accrocher*, to assume any power without right, to encroach. 25 Edw. III. Stat. 3, c. 8 recites: "The secular judges do accroach to them (*accrochent à eux*) cognisance of voidance of benefices"; and Stat. 6 uses the same word of Le Pape de Rome. Blackstone (vol. iv. p. 76) speaks of "accroaching or attempting to exercise royal power." In modern French, *accrocher un procès* means to delay a suit, "to hang it up."

Accrue.—The 5th section of the Married Women's Property Act, 1882, 43 & 44 Vict. c. 75, secures to the married woman as her separate property (see **HUSBAND AND WIFE**) all real and personal property, her title to which, whether vested or contingent, shall *accrue* after the commencement of the Act. After some conflict of opinion as to the meaning of the section, which might refer either to property in which the married woman acquires a title for the first time since the Act, or to property in which she had a reversionary interest at the time when the Act came into operation, and which fell into possession afterwards, it has been settled that it is only where the married woman acquires a title for the first time since the Act that the section applies, and that a prior reversion falling into possession is not separate property (*Reid v. Reid*, 1886, 31 Ch. D. 402, overruling *Baynton v. Collins*, 1884, 27 Ch. D. 604); Stroud, *Jud. Dict.*

Accruer of Right to Land.—See **LIMITATION**; Statute of Limitations, 3 & 4 Will. IV. c. 27, s. 3.

Accrued Shares.—Clauses in a will disposing of the shares of devisees or legatees, dying before a given period or event, do not, in the absence of a distinct evidence of intention, extend to shares which have once accrued under those clauses, so as to pass them a second time (*Ex parte West*, 1784, 1 Bro. C. C. 875; *Melsom v. Giles*, 1870, L. R. 5 C. P. 614). Accrued shares do not pass under the word share or "portion" (*Bright v. Rowe*, 1834, 3 Macl. & R. 316). Accrued shares will go with original shares, if there is an intention expressed that they should do so. (See Theobald on *Wills*, 4th ed., p. 536, and *Greenwood v. Sutcliffe*, 1854, 14 C. B. 226.)

Accumulations.—Until the close of the 18th century, the law placed no restriction on the accumulation of the income of property, and the suspension of all enjoyment of it, so long as the direction for accumulation did not transgress the rule prohibiting the suspension of the alienation of property beyond the period of a life or lives in being and twenty-one years afterwards (see **PERPETUITY**). In the year 1800, however, the Legislature considered it necessary to impose some restriction on directions for the accumulation of income, in consequence of a provision contained in the will of a Mr. Thellusson (who died in 1796), directing the

accumulation of the income of his large property during the lives of all his issue male living at his decease, and the survivor of them. Though this direction was held to be valid, the Act 39 & 40 Geo. III. c. 98 (commonly called the Thellusson Act), was passed in order to prevent such dispositions for the future. This Statute restrained the period of accumulation of income "whereby the beneficial enjoyment is postponed," to one only of the following periods:—(1) The life of the settlor; (2) the term of twenty-one years from his death; (3) during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of the settlor; (4) during the minority or respective minorities of any person or persons who, if of full age, would be entitled to the income directed to be accumulated. These still remain the general rules of English law with regard to directions for the accumulation of income, but there are to be noted several exceptions to, and qualifications of, the provisions of the Act, the language of which has, by more than one judge, been condemned as ill-defined. The Act itself provides (s. 2) that nothing contained in it shall extend to any provision for payment of the settlor's debts, or those of any other person or persons, or to any provision for raising portions for the children of the settlor, or any person interested under the settlement, or to any direction touching the produce of timber or underwood. It has further been held (*Vine v. Raleigh* [1891], 2 Ch. 13, at page 26), that all improvements in substance, which can in any fair sense be regarded as coming under the words "maintaining, in good habitable repair, houses and tenements," are outside the Thellusson Act altogether, though money laid out in building houses on that land would be within the Act; and a provision for insuring houses is also good (see *In re Mason* [1891], 3 Ch. 467). Nor is a direction to pay out of the testator's property the premiums on a policy of insurance, effected by him upon the life of another, rendered void by the Act; such a provision remains valid for the whole term of the life insured (*Baird v. Lister*, 1851, 9 Hare, 177). And if a direction for accumulation offend against the Statute, it is nevertheless not altogether void (so long as it does not offend against the rules as to perpetuities), but is good up to the limits imposed by the Act. Thus a trust by will for accumulation during the life of another is good for twenty-one years (*Griffiths v. Vere*, 1803, Tudor's *Leading Cases in Real Property*, 497, and 9 Ves. 127). And an accumulation is good if it can at any moment be put an end to (*Bateman v. Hotchkin*, 1847, 10 Beav. 426). On the other hand, it must be observed that accumulation will only be allowed for one of the periods permitted by the Act; e.g. a direction to accumulate income for twenty-one years after a testator's death, and thereafter during certain minorities, was held good only for the twenty-one years (*Wilson v. Wilson*, 1851, 1 Sim. N. S. 288; *Jagger v. Jagger*, 1883, 25 Ch. D. 729). And the construction to be put upon the Act is the same whether the accumulation be directed by a deed or by a will (*Lady Rosslyn's Trust*, 1850, 16 Sim. 391). Further, though accumulation be directed, or payment deferred, a legatee, if entitled absolutely, can require payment as soon as he can give a discharge (*Saunders v. Vantier*, 1841, 4 Beav. 115); and this is so as much if the legatee is a charity as if he is an individual (*Wharton v. Masterman* [1895], App. Cas. 186). And though the accumulation be directed to begin many years after the testator's death, it must still end at the expiration of twenty-one years from his death (*Webb v. Webb*, 1840, 2 Beav. 493; *Shaw v. Rhodes*, 1839, 1 M. & C. 154). The Statute provides that income, the accumulation of which it forbids, shall go and be received as if such accumulation had not been directed (see *Eyre*

v. *Maraden*, 1838, 2 Keen, 574; *Sewell v. Denny*, 1847, 10 Beav. 315). One subsequent restriction on accumulation has been imposed by the Legislature in the Accumulations Act, 1892, 55 & 56 Vict. c. 58, which forbids the settlement or disposition of any property, real or personal, so as to accumulate the income "for the purchase of land only" for any longer period than during the minority of a person who, if of full age, would be entitled to receive the income. The Thellusson Act was extended, in 1848, to heritable property in Scotland by Statute 11 & 12 Vict. c. 36, s. 41; but it does not apply to property in Ireland.

Accumulative Judgment.—See CUMULATIVE JUDGMENT.

Accusation of Crime.—1. Whoever outside a Court of justice accuses another person of any criminal offence, punishable by imprisonment, whether it be punishable summarily or on indictment, is liable, if the accusation be false, to an action for defamation of character (see DEFAMATION). If the accusation is made in writing, the maker of it is also liable to indictment, and to be entitled to acquittal the defendant must satisfy the jury that the accusation not only is true but was made in the public interest (6 & 7 Vict. c. 96, s. 6). The punishment is fine or imprisonment for not over two years if the falsity is, and not over one year if it is not, known to the maker (6 & 7 Vict. c. 96, ss. 4, 8). It is immaterial whether the accusation is made to the person accused or to a third person (*R. v. Adams*, 1888, 22 Q. B. D. 63).

Where the libel is published in a registered newspaper, the defence of truth and public interest can be considered at the preliminary inquiry (44 & 45 Vict. c. 60, ss. 4, 17; see DEFAMATION; NEWSPAPERS); but in other cases this cannot be done (*R. v. Carden*, 1880, 5 Q. B. D. 1). Where the accusation is made orally, an indictment will not lie in English law; but the accuser may be summarily convicted for using language calculated to provoke a breach of peace.

2. No action or indictment for defamation will lie for any accusation of crime, made in a Court of justice in the course of any legal proceedings, whether by judge, jury, advocate, party, or witness (*Munster v. Lamb*, 1883, 11 Q. B. D. 588). See ABSOLUTE PRIVILEGE; ADVOCATE.

But a person prosecuted for crime maliciously, and without reasonable and probable cause, has his remedy by action for malicious prosecution, or, as it is termed in Scotland, judicial slander. See MALICIOUS PROSECUTION.

A conspiracy to accuse a person falsely of crime is indictable; and where the accusation is falsely made on oath the maker is indictable for perjury.

To publish an accusation of crime against any person, with intent to extort money or money's worth, is a misdemeanour, punishable by imprisonment, with or without hard labour, for not more than three years (5 & 6 Vict. c. 96, s. 3; 54 & 55 Vict. c. 69, s. 1 (2)). And to accuse, with like intent, any person of rape or infamous crime (*i.e.* crime involving sexual perversion) is felony, whether the accusation is written or oral, and is punishable by penal servitude for life, or not less than three years, or by imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 96, ss. 46, 47, 48; 54 & 55 Vict. c. 69, s. 1). Hereon see ABOMINABLE CRIME; EXTORTION; MENACES.

Accustomed Rent.—It was formerly usual, in powers of leasing, to require the reservation of "the ancient and accustomed rent," or the "accustomed rent," instead of the "best" or "most" rent. This is now done very rarely. Where such a term is introduced, the better opinion is that, as a general rule, the rent reserved at the time of the creation of the power, where a lease was then in being, or the last before it, where no lease was then in being, is the rent to which the powers must be taken to refer (Sugden, *Powers*, 790; Farwell on *Powers*, 2nd ed., 624; Platt on *Leases*, i. 465; *Doe d. Douglas v. Loch*, 1835, 2 Ad. & E. 705; *Roe d. Brune v. Rawlings*, 1806, 7 East, 279; 8 R. R. 632; *Doe d. Lord Egremont v. Grazebrook*, 1843, 4 Q. B. 406).

Ace of Hearts.—An unlawful game. Sec. 2 of 12 Geo. II. c. 28, declared it to be a game or lottery by cards, within the meaning of the Statutes 10 & 11 Will. III. c. 17; 9 Anne, c. 6, s. 56; and 8 Geo. I. c. 2, s. 36, and declared any person setting up the game liable, on summary conviction before a justice of the peace, to a penalty of £200; and by sec. 3, any person playing or staking at the game is liable in the same manner to a penalty of £50.

Acknowledgment.—This expression is used in several Acts of Parliament relating to limitation of time for actions, namely, 9 Geo. IV. c. 14 (the Statute of Frauds Amendment Act, 1828); 3 & 4 Will. IV. c. 27 (The Real Property Limitation Act, 1833); 3 & 4 Will. IV. c. 42 (The Civil Procedure Act, 1833); 23 & 24 Vict. c. 38 (The Law of Property Amendment Act, 1860); and 37 & 38 Vict. c. 57 (The Real Property Limitation Act, 1874). Banning on *Limitations*, 2nd ed., p. 41, states that there are four requisites of a sufficient acknowledgment—(1) It must be made in sufficient terms; (2) By the proper person; (3) To the proper person; and (4) With the proper formalities, if any.

The Limitation Act of 1623 provides limitations for nearly all personal actions in England; under this Act, though there was no provision to that effect, it was soon held that an acknowledgment, even by parol, took the case out of the Statute in cases of debt, though not in tort or trespass. A remedy for this was provided by the Statute of Frauds Amendment Act, 1828 (9 Geo. IV. c. 14), which enacted that in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Act of 1623, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and it was further provided that, in the case of joint-contractors, one contractor was not to be prejudiced by the written acknowledgment or promise of any of the other contractors; that nothing in the Act was to lessen the effect of any payment of any principal or interest by any person; and that, though in an action against joint-contractors the plaintiff might be barred in the case of one, he should be entitled to recover against another, by virtue of a new acknowledgment or promise. This Act merely required proof of an acknowledgment to be in writing, and did not alter the law of acknowledgments. The Act did not provide for signature by an agent, but the Mercantile Law Amendment Act, 1856, has enacted that an acknowledgment made in writing, signed by an agent duly

authorised so to do, shall have the same effect as if signed by the principal.

The cases on the Acts were conflicting, but in *Tanner v. Smart* (a leading case), 1827, 6 Barn. & Cress. 603, an action was brought on a promissory note, and the defendant pleaded the Statute of Limitations. The following acknowledgment was proved: "I cannot pay the debt at present, but I will pay it as soon as I can." Held, that this was not sufficient, without proof of the defendant's ability to pay. The rule since that case has been that there must be an express promise to pay, or such an acknowledgment of the debt that a promise is to be implied (see *Phillips v. Phillips* 1844, 3 Hare, 281).

There have been a large number of cases since *Tanner v. Smart*, of which cases a short and well-arranged summary will be found in Darby and Bosanquet's *Statutes of Limitations*, 2nd ed., p. 69. See also Chitty's *Statutes*, 5th ed., *Limitation*, p. 13 *et seq.* The most recent case is *re Buskin* [1894], 15 R. 117, in which the debtor wrote: "I don't see how it is possible for me to be indifferent on the matter of this debt; if I were able in any way to reduce it further, you may be quite sure I should do so": held a sufficient acknowledgment. A signature by an agent is not sufficient under these statutes.

Acknowledgment of Title.—By 3 & 4 Will. IV. c. 27, s. 14, it is enacted that, when any *acknowledgment* of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person to whom such *acknowledgment* shall have been given, shall be deemed to have been the possession or receipt of or by the person to whom or to whose agent such *acknowledgment* shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such *acknowledgment*, or the last of such *acknowledgments*, if more than one, was given. An acknowledgment under this section must be in writing, and cannot be given by the giver's agent. Darby and Bosanquet's *Statutes of Limitations*, p. 383 *et seq.*, gives a summary of the cases as to what acknowledgment is sufficient. See also Chitty's *Statutes*, 5th ed., *Limitation*, p. 27. There is a doubt as to whether this section causes the time to commence to run from an acknowledgment, even though it had then commenced to run. It was held by Malins, V. C., in *Sanders v. Sanders*, 1882, L. R. 19 Ch. D. 373, that an acknowledgment after the expiration of twenty years was sufficient, but the Court of Appeal in effect over-ruled this view.

Mortgages.—The 28th section of the Act, now repealed by 37 & 38 Vict. c. 57, was a section applying to mortgages similar to the 7th section of the later Act, except that twelve years was substituted for twenty years by the 7th section, which enacted that, when a mortgagee shall have obtained possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an *acknowledgment* in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and

in such cases no proceeding shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; an acknowledgment to one mortgagor or his agent is sufficient. But, in the case of mortgagees, an acknowledgment shall only be effectual as against persons signing it, and persons claiming under them, and shall not give the mortgagor a right to redeem the mortgage against persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees as shall have given such acknowledgment shall be entitled to a divided part of the property comprised in the mortgage, and not to any ascertained part of the mortgage money, the mortgagor shall be entitled to redeem the divided part on payment of the part of the mortgage money bearing the same proportion to the whole as the value of the divided part shall bear to the whole of the mortgaged property. Under sec. 7 of 37 & 38 Vict. c. 57, an acknowledgment to a third party is of no avail, but either the person to be paid or to pay, or their respective agents, may give an acknowledgment. An acknowledgment by one of two mortgagee trustees was held to have no effect (*Richardson v. Younge*, 1871, L. R. 8 Ch. 478). See Chitty's *Statutes, Limitation*, p. 50.

Mortgages and Legacies.—Section 40 of 3 & 4 Will. iv. c. 27, now also repealed by 37 & 38 Vict. c. 57, was another section applying to mortgages, similar to sec. 8 of the later Act, except that twelve years was substituted for twenty years by the 8th section, which enacted: That no action, suit, or proceedings shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge or release of the same, unless in the meantime some part of the principal money or interest shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person to whom the same shall be payable, or his agent, to the person entitled, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payments or acknowledgments, or the last of such payments or acknowledgments, if more than one, was given.

It has been decided on this section that the limit of twelve years applies to the personal remedy on the covenant in a mortgage deed (*Sutton v. Sutton*, 1882, 22 Ch. D. 511), and also to a remedy on a collateral bond (*Fearnside v. Flint*, 1882, 22 Ch. D. 579). See also Chitty's *Statutes, Limitation*, pp. 52-4; Darby and Bosanquet, p. 221 *et seq.*

Arrears of Rent or Interest on Charges.—By the same Act of 1833, s. 42, it was enacted that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears or interest, shall be recovered but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. The section also contained a proviso as to the case of a prior incumbrancer being in possession.

In this case the agents of either party may give an acknowledgment. For cases, Chitty's *Statutes, Limitation*, p. 36; Darby and Bosanquet, p. 220, *et seq.*

Rent or Specialities.—The Civil Procedure Act, 1833, 3 & 4 Will. iv.

c. 42, providing twenty years' limitation for actions for rent on an indenture of demise, on specialities or recognisances, enacted by sec. 5, that if any *acknowledgment* should have been made, either by writing signed by the party liable, or his agent, the person entitled to such actions might bring his action for the money remaining unpaid and so *acknowledged* to be due within twenty years after such acknowledgment by writing, or in case the person entitled to such action shall at the time of such acknowledgment be under such disability, or the party making such acknowledgment were, at the time of making the same, beyond the seas, then within twenty years after such disability had ceased, or the party's return. See ABSENCE BEYOND SEAS.

The effect of an acknowledgment under this Act is not the same as under the Limitation Act of 1863. An admission, even to a stranger, is sufficient (*Moodie v. Bannister*, 1859, 4 Drew, 312). See Chitty's *Statutes, Limitation*, p. 40; Darby and Bosanquet, p. 155.

Intestates' Estates.—The Law of Property Amendment Act, 1860, 23 & 24 Vict. c. 38, provides (s. 13) for the limitation of twenty years in cases of claims to the personal estates of intestates, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some *acknowledgment* of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought but within twenty years after such accounting, payment, or acknowledgment, or the last of them if more than one, was made or given.

The acknowledgment may be made by the person accountable, or his agent, to the person entitled, or his agent (see Banning, p. 235; Darby and Bosanquet, p. 172).

For acknowledgment by part payment, see PART PAYMENT. See also LIMITATION.

Acknowledgment of Deeds.—All deeds purporting to dispose of the land of a woman married before the first of January 1883, unless she is entitled thereto for her separate use (see HUSBAND AND WIFE), or of her reversionary interest in personal property, must be executed by her and her husband, and acknowledged by her in accordance with the provisions of the Fines and Recoveries Act, 3 & 4 Will. iv. c. 74, and sec. 7 of the Conveyancing Act, 1882, 45 & 46 Vict. c. 39, and rules made thereunder.

Sec. 77 of the former Act provided that no deed executed under that Act by a married woman, effecting any disposition, release, surrender, or extinguishment of any estate in lands of any tenure, or in any money subject to be invested in the purchase of lands, or the release or extinguishment of any power which a married woman had over such lands or money, should be valid and effectual unless the husband concurred in the deed, and unless the deed were acknowledged by her as thereafter directed. Legal estates in copyholds are excluded where, previously, surrender had been effected by the wife in concurrence with the husband, but an examination and acknowledgment are required in the case of equitable estates in copyholds (s. 90). By the Real Property Act, 1845, 8 & 9 Vict. c. 106, these provisions were extended to dispositions of contingent and other like interests which were thereby made alienable, and to disclaimers of estates, or interests in land, by married women. The Act of 1857, 20 & 21 Vict.

c. 54, to enable married women to dispose of reversionary interests in personal estate (Malin's Act), provided that every deed thereunder should be acknowledged in the manner prescribed in and by the Fines and Recoveries Act.

Every deed executed by a married woman under the above mentioned enactments (except as protector of a settlement) must, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of (now) the High Court (s. 79 of the Fines and Recoveries Act), or a County Court judge (County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 184), or before one of the Perpetual Commissioners appointed for this purpose by the Lord Chief-Justice of England (Judicature Act, 1881, s. 26), or a Special Commissioner to be appointed by the Court. The Perpetual Commissioners are appointed for each county, from such proper persons as the Lord Chief-Justice shall think fit (usually, but not necessarily, solicitors). A Divisional Court has held that the Commissioner can only act in the county for which he is appointed (*In re Jane Read*, 1877, W. N. 117); but in *Blackmur v. Blackmur*, 1876, 3 Ch. D. 633, Jessel, M. R., held that the Commissioner need not be appointed for the county in which the acknowledgment is taken (see sec. 81 of the Fines and Recoveries Act).

A Special Commissioner is appointed where, by residence beyond seas, or ill-health, or any other sufficient cause, the acknowledgment cannot be made in the ordinary manner.

Before receiving the acknowledgment, the Commissioner must examine the married woman, apart from her husband, touching her knowledge of such deed, and ascertain whether she freely and voluntarily consents to it; and unless she does, shall not permit her to acknowledge it; and in such case the deed, so far as relates to the execution thereof by her, is void (s. 80). Sec. 7 of the Conveyancing Act, 1882, provides that interest as party, solicitor to one of the parties, or clerk to such solicitor, shall not invalidate the acknowledgment. The rules direct that a declaration shall be made that the Commissioner has no such interest, and that such declaration shall be added to the memorandum of acknowledgment. But this, and the further direction that the Commissioner shall examine as to whether the married woman intends to give up her interest without having any provision made for her, are by the sixth rule declared not to invalidate the acknowledgment.

The memorandum of acknowledgment, which must be signed by the Commissioner, certifies specifically that the examination has been made in accordance with the Act, and is to be in the form prescribed by the rules.

Prior to the Conveyancing Act, 1882, which provides that the deed shall take effect, as regards the execution thereof by the married woman, at the time of acknowledgment (s. 7), it was necessary to file a separate certificate in the Common Pleas or the High Court, and thereupon the deed took effect from the date of the acknowledgment (s. 86 of Fines and Recoveries Act). The sections of the latter Act relating to certificates are repealed; but subsecs. (6) and (7) of the above-mentioned sec. 7 enact that if a deed were executed before the first of January 1883, a certificate of an acknowledgment, whether made before or after that date, must be filed, as theretofore, in the central office, where the index of certificates is still kept and may be searched.

The execution of a power does not require acknowledgment (Sugden, *Powers*, p. 153, 8th ed.).

The Lord Chancellor cannot dispense with the necessity of acknow-

ledgment by a lunatic married woman, and can only vest in the purchaser an equitable fee binding on herself and her heir (*In re Stables*, 1864, 4 De G., J. & S. 257).

A married woman, in order to exercise the powers given to a tenant for life under the Settled Land Act, 1882, without acknowledgment, where the marriage and the settlement were before 1883, must be entitled for her separate use (s. 61; and see Wolstenholme and Brunton's *Conveyancing Acts*, p. 317 n).

A contract by a woman married before 1883, for the sale of land, is enforceable if made by deed acknowledged (*Crofts v. Middleton*, 1856, 8 De G. M. & G. 192).

The proceeds of sale of real estate, and a mortgage debt on real estate, (*Williams v. Cooke*, 1863, 4 Gif. 343), which, in the words of the 77th section of the Fines and Recoveries Act, the married woman alone, or she and her husband in her right, may have, must be disposed of by acknowledged deed; but this does not include a reversionary interest in a mortgage debt which is part of a residue belonging to trustees, and to which other parties as well as husband and wife are entitled (*In re Newton's Trusts*, 1882, 23 Ch. D. 181, where the deed was executed before Malin's Act).

Section 91 of the Fines and Recoveries Act provides for dispensing with the concurrence of the husband in case of lunacy or idiocy, or other cause. (See Macqueen, *Husband and Wife*, 3rd ed., p. 67.)

The Agricultural Holdings Act, 1883, s. 26, contains provisions for taking the examination of a married woman by the County Court judge, in regard to acts done by her thereunder. See ABSTRACT OF TITLE.

Acolyth, Acolyte (ἀκόλυθος)—in old English, "Collet." One of the minor orders (*ordines non sacri*) of the Church. This office has not been recognised as an order in the Church of England since the Reformation. The duties of the acolyth were to prepare the altar for the celebration, and to bear the lighted candle during the reading of the Gospel, or while the priests consecrated the host. He was allowed to wear the cassock and surplice (Hook's *Ecclesiastical Dictionary*, 8th ed., p. 10; Phillimore's *Ecclesiastical Law*, 2nd ed., pp. 89, 90).

Acquiescence is the common element in a somewhat indefinite group of equitable estoppels, constituted by the fact that the person entitled has, as it is said, "slept upon his rights," and by his conduct at the time of a breach of them, or subsequently thereto, has, with full knowledge, both of his own rights and of the acts which infringe them, led the persons responsible for the infringement to believe that he has waived or abandoned his rights. The terms "laches," "acquiescence," "standing by," and "delay" are frequently associated together, and they do not appear to be capable of distinct definition.

It is unnecessary to consider the legal effects of acquiescence, in the sense of actual consent or agreement to, or participation in, the acts which are the subject of an action by the person who complains of them, since no one can seek a remedy against another in respect of his own acts (and see LEAVE AND LICENSE). The cases to be considered are those in which the conduct relied on as acquiescence falls short of this.

"The term acquiescence must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the

act acquiesced in is in progress, or only after it has been completed. If a person, having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed, he cannot afterwards be heard to complain of the act." This, as Lord Cottenham said (*Duke of Leeds v. Amherst*, 1846, 2 Ph. 117), is the proper sense of the term "acquiescence," and in that sense it may be defined as *quiescence under such circumstances as that assent may be reasonably inferred from it*, and is no more than an instance of the law of estoppel by words or conduct. See ESTOPPEL. But when once the act is completed without any knowledge or (without any) assent on the part of the person whose "right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him, which at all events, as a general rule, cannot be divested without accord and satisfaction" (*q.v.*), or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under particular circumstances; and it is clear that even an express promise by a person injured, that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding (*per* the C. A. in *De Bussche v. Alt*, 1877, 8 Ch. D. 286).

The doctrine formerly covered a wider area than it now does. Before the Real Property Limitation Act of 1833 for the first time introduced a statutory rule of limitation into the Court of Chancery, that Court, upon the principle embodied in the maxim, "*aquitas vigilantibus non dormientibus subvenit*," was accustomed to refuse to entertain stale claims (2 Spence, 6); but it is now settled that mere delay constitutes no defence to a legal claim, unless the statutory period of limitation has expired, although it may sometimes operate to bar a right which was recognised in equity only (see below). And, further, in cases where the plaintiff had not applied to the Court with reasonable promptitude, he was sometimes required to establish his right at law before a Court of equity would recognise it. Since the Judicature Acts, this practice has, of course, been abandoned (*Fullwood v. Fullwood*, 1878, 9 Ch. D. p. 179).

There can be no "acquiescence" without full knowledge both of the right infringed (*Willmot v. Barber*, 1880, 15 Ch. D. 96; *Beauchamp v. Winn*, 1873, 6 H. L. 223), and of the acts which constitute the infringement (*De Bussche v. Alt*, 1877, 8 Ch. D. 286). Parties cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them" (*per* Turner, V. C., in *Marker v. Marker*, 1851, 30 Beav. 65). Constructive notice, not amounting to actual knowledge, is not sufficient (*Willmott v. Barber*, 1880, 15 Ch. D. 96). Thus, in the case last cited, a claim to compel a lessor to license an assignment, in which he was alleged to have acquiesced, failed because he showed that he did not know that his consent to the assignment was required. And in *De Bussche v. Alt*, *supra*, where an agent for the sale of a ship bought her himself, after arranging for a re-sale at a profit, the claim of the principal to recover the profit succeeded, notwithstanding that he had agreed to the sale, and had not commenced his suit until four years after the transaction, because, when he was said to have acquiesced, he did not know the particulars of the second sale, or that it had been arranged before the first was concluded (8 Ch. D. pp. 313, 315).

It follows from this that acquiescence in proceedings that would otherwise be an actionable wrong, *e.g.* a nuisance, is no bar to a remedy for a wrong done by an unforeseen extension of the same proceedings (*Bankart v. Houghton*, 1858, 27 Beav. 273).

Acquiescence during the progress of the infringing act, or of steps necessarily leading to it, will bar a legal right only where it amounts to an encouragement to do the act or take the steps, in the belief or expectation that the right does not exist or has been abandoned ("standing by"), or is such as to raise an inference that the parties have acted upon an agreement inconsistent with the right asserted.

The doctrine of "standing by" rests upon the ground that it is fraudulent for anyone to assert a right after having encouraged "another to act upon an expectation that it does not exist, or has been abandoned" (see *Savage v. Foster*, 1772, 2 White & Tudor, L. C., 6th ed., 678). This Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of "encouragement" (*per* Eldon, L. C., in *Dann v. Spurrier*, 1802, 7 Ves. 231; 6 R. R. 119). The conditions of estoppel by standing by were carefully formulated by Fry, J., in *Willmott v. Barber* (1880, 15 Ch. D. 96) as follows:—

(a) The party who seeks to establish the estoppel must have made a mistake as to his legal rights, or there can be no estoppel. Thus in *Ramsden v. Dyson*, 1865, L. R. 1 H. L. 129, tenants at will who had built houses on their holdings, knowing that they had no fixed tenure, but believing that the landlord would not evict them so long as they paid the agreed rent, were held to have no claim in equity against the landlord. So in an action for infringement of a patent, a defence, on the ground that the plaintiff had known of the intention of the defendants to erect the machine in question, and had not warned them that it infringed his patent, failed, because the defendants did not show that they were ignorant of the patent or that the plaintiff supposed them to be so (*Proctor v. Bennis*, 1887, 36 Ch. D. 740).

(b) He must have acted upon the faith of his mistaken belief. When, therefore, the defendants had attempted to illegally forfeit the share of the plaintiff in a cost-book partnership, and he had taken no action for about four years after the forfeiture, the defence of acquiescence failed, *inter alia*, because the correspondence showed that the defendants had never acted upon the belief that he had acquiesced (*Clarke v. Hart*, 1858, 6 H. L. C. 633). But in a similar case, where the excluded partner had acquiesced for nine years and left the continuing partners to take all the risks of the business for that period, he was held to have abandoned his right (*Prendergast v. Turton*, 1846, Y. & C. C. 98; *Clegg v. Edmondson*, 1857, 8 De G., M. & G. 787). The last-cited cases were treated as instances of abandonment in *Clarke v. Hart* (*supra*).

(c) The person estopped must have known of the existence of his own right (*Willmott v. Barber*, *supra*);

(d) And of the other party's mistaken belief of his right. If he does not, there is nothing which calls upon him to assert his right (*Proctor v. Bennis*, 1887, 36 Ch. D. 740). In the case last cited, the Court of Appeal held that it is not the duty of a patentee to warn intending infringers;

(e) Lastly, the person estopped must have encouraged the other party in the acts which he has done, either directly or by abstaining from asserting his right (*Dann v. Spurrier*, 1802, 7 Ves. 231; 6 R. R. 119; *Rochdale Canal Co. v. King*, 1851, 2 Sim. N. S. 78).

Some cases, which hardly conform to the conditions set out above, may

be best explained, perhaps, as resting upon implied agreement. In *Powell v. Thomas* (1848, 6 Ha. & Tw. 300), a colliery proprietor wrote to a landowner, over whose land he desired to carry a railway, offering to pay for the land required, according to a fair valuation. No reply was sent, but the railway was made without objection, and the price to be paid was subsequently discussed, but not agreed upon. Some years later, when the landowner sought to eject the colliery proprietor, he was restrained from doing so, upon the full value of the land being paid into Court. Under similar circumstances, the Court inferred an agreement by a railway company, that the owner of a shipyard who had made a tunnel and siding to their line should have the use of it, paying toll, so long as he owned the yard (*Laird v. Birkenhead Railway Co.*, 1859, 29 L. J. Ch. 218; *Thomas v. Atherton*, 1877, 10 Ch. D. 185) is another instance. There, parties to a dispute, who had not actually consented to a reference, attended at and took part in the arbitration, and it was held that they were bound by the award.

Such an implied agreement, where the consideration on one side has been executed, will be binding, notwithstanding that ordinarily the party bound can only contract under seal (*Crook v. Corporation of Seaford*, 1871, L. R. 6 Ch. 551), or in some other formal manner (*Laird v. Birkenhead Railway Co.*, *supra*).

It has been said to be an element in these cases, that the matter acquiesced in shall be of great value to the other party (see *per* James, V. C., in *Bankart v. Tennant*, 1870, L. R. 10 Eq. 141). But this does not seem to rest upon any intelligible principle, and the case cited was determined on the ground that there was a mutual understanding of the nature of a tenancy at will: "So long as you are good customers of ours, and are using our canal, we shall not quarrel with you about the use of water which is of no value to us." This could not be the foundation of a right to the water.

If full notice of an intended course of action is given to persons whose interests will be affected by it, who may reasonably be expected to consent, and whose consent is necessary to make it legal, they will usually be held to have given such consent if they do nothing. Upon this principle, a surrender of shares which could only be validly made with the consent of every member of the company, was upheld (*Evans v. Smallcombe*, 1868, L. R. 3 H. L. 249). Lord Cairns said in the case just cited. "If by 'acquiescence' is meant a course of conduct which amounts to active and intelligent consent, I think it is very likely that many of those shareholders could not be held to have actively or intelligently consented to what was going on. . . . If they had notice, and if they were content not to oppose those acts which they knew were every day being done, then I think they are debarred in point of equity from coming forward at a later period for the purpose of undoing the rights and releases which had been created and given." As to the circumstances under which shareholders can be held to have had such knowledge of acts of directors which are *ultra vires*, as by their 'acquiescence' to have all agreed to them, see *Houldsworth v. Evans*, 1868, L. R. 3 H. L. 263, and the cases collected in Buckley on *Companies* in the notes to Table A, arts. 19 and 55). And see as to the doctrine that silence gives consent only where the circumstances make it probable that there would be an explicit refusal if it were intended to be refused, *Wiedemann v. Walpole* [1891], 2 Q. B. 534. (See also *Proctor v. Bennis*, cited above, and *Darney v. London, Chatham, and Dover Railway Co.*, *infra*.)

Acquiescence may effect a variation of the terms of a contract, either by being equivalent to acceptance of a substituted performance (*Watts v. Hyde*, 1848, 17 L. J. Ch. 409) or being such conduct as justifies one party

in believing that the other has waived a term he was entitled to insist upon (*per* Lord Cranworth in *Darnley v. London, Chatham, and Dover Railway Co.*, 1869, L. R. 2 H. L. at p. 60). In the case cited, Chelmsford, L. C., said, "A waiver must be an intentional act with knowledge" (p. 57); but it is submitted that Lord Cranworth's test, provided of course that the party barred knew that the other believed the term was waived, is the true rule, for an expectation knowingly encouraged by the party affected will be treated as an agreement as against him (see *per* Lord Kingsdown in *Ramsden v. Dyson*, 1865, L. R. 1 H. L. 129). As to waiver of restrictive covenants, see below.

The acts which are relied on as indicating a consent to the variation, or a waiver, of a person's rights under a contract, must be clearly referable to the matter in question. Where, therefore, a tenant who had agreed to take a lease of cellars, if they were made dry, took possession and paid rent for two years, although the work had not been done, relying upon the landlord's promise to do it, it was held that the payment of rent ought to be treated as made only in respect of his use and occupation, and that he had not waived performance of the stipulation (*Lamare v. Dixon*, 1873, L. R. 6 H. L. 414).

In cases of equitable claims, staleness of demand as distinguished from the Statute of Limitations, and analogy to it, may furnish a defence (*per* Lindley, L. J., in *re Sharpe* [1892], 1 Ch. at p. 168). Where it would be *practically unjust* to give a remedy, either because the party has by his conduct done that which might justly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted; in either of these cases, lapse of time and delay are most material. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy (*Lindsay Petroleum Co. v. Hurd*, 1874, L. R. 5 P. C. 221). No more distinct rule can be laid down (*per* Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.*, 1878, 3 App. Cas. 148).

If the defendant has not been prejudiced by the delay, and it is either not excessively long, or is explained, it constitutes no bar (*re Sharpe, supra*; *Clarke v. Edmondson, supra*), at least, unless the delay is so great as to raise a presumption of release (see Lewin on *Trusts*, 9th ed., pp. 990 *et seq.*).

In cases of *fraud* it must appear that the party defrauded knowingly forbore to assert his right (*Lindsay Petroleum Co. v. Hurd, supra*; and see *Gibbs v. Guild*, 1881, 9 Q. B. D. 59).

The following are examples of equitable claims to which this defence has been pleaded: To upset purchases by a trustee (see Lewin, 9th ed., p. 546), or by a solicitor from his client (*Austin v. Chambers*, 1837, 6 Cl. & Fin. 1—a delay of ten years; *Gresley v. Monsley*, 1859, 4 De G. & J. 78—a delay of eighteen years, during which, however, the solicitor continued to act,—in both cases the defence failed); to fix a defendant with a constructive trust (*Clegg v. Edmondson*, 1857, 8 De M. & G. 787); to make legatees refund to creditors (*Ridgway v. Newstead*, 1860, 2 Gif. 492; *Blake v. Gale*, 1886, 32 Ch. D. 571).

Settlements long acquiesced in will not be disturbed (*Bright v. Legerton*, 6 Jur. N. S. 1179), unless there is a *legal* right, *e.g.* under the Statute 27 Eliz. c. 5, *re Maddever*, 1884, 27 Ch. D. 533. So, where a

post-nuptial settlement of a reversion was left unchallenged by the settlor, after she became a widow, it was held to be binding on her after her re-marriage (*Ashton v. Macdougall*, 1842, 5 Beav. 56); and if payments are made for years, upon a mistaken construction of a settlement, or other mistake as to equitable right, and are acquiesced in by all parties, they cannot afterwards be recovered from the payees (*Bate v. Hooper*, 5 De G., M. & G. 338; *Stafford v. Stafford*, 1857, 1 De G. & J. 193).

• Claims in respect of breaches of trust must be promptly put forward when the facts are known to persons of full age (*Walker v. Symmonds*, 1818, 3 Swan. 1; 19 R. R. 155; Lewin, 9th ed., p. 1056) who are entitled in possession (*Life Association of Scotland v. Siddall*, 1861, 3 De G., F. & J. 58). Formerly, mere delay was no bar in cases of express trust, unless so great as to raise a presumption of release; but by the Trustee Act, 1888, s. 3, a trustee can now plead the Statutes of Limitation, unless the breach of trust was fraudulent or he has retained the proceeds of trust property. No shorter period of delay than that prescribed in analogous cases by the Statute bars a claim in respect of breach of trust as "stale," where delay alone and no active acquiescence is relied on (see *re Sharpe* [1892], 1 Ch. 154).

Upon applications to rescind agreements to take shares in joint-stock companies, or to remove the applicant's name from the register, in the interests of other shareholders and of creditors of the company, the rule requiring that the application for relief shall be made promptly after the applicant has knowledge of his right, is strictly applied (see *Ashley's case*, 1870, L. R. 9 Eq. 263; *Downes v. Ship*, 1868, L. R. 3 H. L. 343), and, apart from any question of delay, if the applicant continues to act as a shareholder after he knows the fact, his claim will be barred (*Sharpley v. Louth and East Coast Railway Co.*, 1876, 2 Ch. D. 663). The authorities on this head will be found in Buckley on *Companies* under s. 35 of the Companies Act, 1862.

Without wholly barring a right, acquiescence may cause the Court to refuse the special forms of equitable relief, such as specific performance (Lewin, 9th ed., p. 994; Fry, 3rd ed., p. 504) or injunction.

The grant or refusal of interlocutory injunctions is chiefly affected by considerations of convenience, and anything in the nature of delay or acquiescence will usually be a bar (see *Johnson v. Wyatt*, 1863, 2 De G., J. & S. 18).

At the trial, if the plaintiff has a legal right, mere delay in enforcing it will not prevent the grant of an injunction (*per* Fry, J., in *Fullwood v. Fullwood*, 1878, 9 Ch. D. p. 178), but acquiescence in the breach of the right may cause the Court to give damages instead of an injunction (*per* Fry, L. J., in *Sayers v. Collyer*, 1884, 28 Ch. D. p. 110), probably because the plaintiff's conduct shows that the breach is not important to him, and may be compensated by damages (see *Shelfer v. City of London Electric Lighting Co.* [1895], 1 Ch. 287), and anything like acquiescence, or even delay to take proceedings or give notice of objection (*Von Joel v. Hornsey* [1895], 2 Ch. 774), after the plaintiff is aware that the defendant's operations will interfere with his right, would be a bar to a mandatory injunction (see INJUNCTION), if the injunction would occasion great loss to the defendant (*Baxter v. Bower*, 1875, 44 L. J. Ch. 625; *Cooper v. Hubbuck*, 1862, 30 Beav. 160).

Acquiescence is frequently pleaded as a defence to actions to enforce restrictive covenants. In *Sayers v. Collyer* (1884, 28 Ch. D. 103) the covenant was not to carry on a trade, and the plaintiff, who had known of the opening of a beer shop by the defendant for three years before the action, and had himself bought beer at the shop, was held to be disentitled to relief.

If a person entitled to insist upon such covenants allows the subject-matter to be so changed that they no longer serve any beneficial purpose, he cannot obtain equitable, as distinguished from legal, relief in aid of his rights, but waiver in respect of trifling breaches, or in a few particular instances, will not operate as a general bar (see *Knight v. Simmonds* [1896], 2 Ch. 294, and the cases there cited).

As to acquiescence in infringements of patents, see *Neilson v. Thompson*, 1841, 1 Web. P. C. 278, and *Proctor v. Bennis*, 1887, 36 Ch. D. 740; trade marks, *Mouson v. Boehm*, 1884, 26 Ch. D. 398, and *Marquis of Londonderry v. Russel*, 1886, 3 T. L. R. 360; copyright, *Hogg v. Scott*, 1874, L. R. 18 Eq. 444; nuisance, *Bankart v. Houghton*, 1859, 27 Beav. 425, and *Wicks v. Hunt*, 1859, John. 372.

A continual claim (*Lehmann v. Macarthur*, 1868, L. R. 3 Ch. 496), or mere notice of objection (*Clegg v. Edmonson*, 1857, 8 De G., M. & G. 787; *Wicks v. Hunt*, *supra*; *Parrot v. Shelland*, 1857, 16 W. R. 928,—money taken “under protest”) will not keep alive claims which are abandoned by conduct.

Married women and infants are equally barred with persons *sui juris* by such acquiescence as makes the assertion of a claim fraudulent (see *Savage v. Foster*, 1722, and the notes thereto in 2 White and Tudor's L. C., 6th ed.). As regards the former, married women were, even before the Married Women's Property Acts, also held to be barred in regard to equitable claims by the lesser degrees of acquiescence which suffice to defeat such claims (*Stafford v. Stafford*, 1857, 1 De G., F. & J. 193; *Skottorwe v. Williams*, 1861, 3 De G., F. & J. 535; *re Fiddey*, 1866, L. R. 2 Eq. 538).

But no acts of acquiescence during coverture, where there is no question of fraud, can debar a woman from setting aside a settlement of property which she is incompetent to deal with while covert, as, for instance, reversionary personalty not being separate estate (*Ashton v. Macdougall*, 1842, 5 Beav. 56; *Seaton v. Seaton*, 1888, 13 App. Cas. 61). See HUSBAND AND WIFE.

As to acquiescence in a settlement made by the settlor when under age, see *Carter v. Silber* [1892], 2 Ch. 278; affirmed [1893], App. Cas. 360.

Acquire.—Meaning of, in Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85. By sec. 25, in every case of a judicial separation, the wife, from the date of the sentence, and whilst the separation continues, is to be considered as a feme sole with reference to property of every description which she may *acquire*, or which may come to or devolve upon her.

If a reversionary interest belonging to the wife before the desertion, or before the decree of judicial separation was pronounced, falls into possession while the decree or protection order is in force, the wife is entitled to it as though she were a feme sole, and that as against the husband's assignee, if the fund was not reduced into possession at the date of the decree (*In re Insole*, 1865, L. R. 1 Eq. 470; *In re Emery's Trusts*, 1884, 50 L. T. 197). Where a married woman, entitled to a legacy charged on real estate, which had not been reduced into possession by her husband, obtained a protection order in consequence of her husband's desertion, it was held that the legacy, on being paid to her after the date of the order, was property which then came to or devolved upon her (*In re Coward and Adam's Purchase*, 1875, L. R. 20 Eq. 179).

A wife who has obtained a decree for judicial separation is to be considered as a feme sole with respect to such property only as she may acquire,

or which may come to or devolve upon her after the decree. The 25th section does not apply to property to which the wife may be entitled in possession at the date of the decree (*Waite v. Morland*, 1888, 38 Ch. D. 135; and see *Nicholson v. Drury Buidings Estate Co.*, 1877, 7 Ch. D. 48; *Dawes v. Creyke*, 1885, 30 Ch. D. 500; *Hill v. Cooper* [1893], 2 Q. B. 85).

See HUSBAND AND WIFE; JUDICIAL SEPARATION.

Acquisition of Domicile.—See DOMICILE.

Acquisition, Right of, by a State.—According to Grotius, there are three modes of acquisition by a State: (1) by occupation (*occupatione derelicti*); (2) by treaty and convention (*pactionibus*); (3) by conquest (*victoriæ jure*) (lib. ii. c. ix. s. 11, p. 338). See these headings.

Acquisition is (a) original; (b) derivative. Original acquisition includes occupation, accession, and prescription. Derivative acquisition denotes acquisitions by treaty or convention, including transfer, gift, sale, exchange, inheritance by testament or succession, and acquisitions by conquest (Phillimore, *International Law*, vol. i. ch. xii. p. 264).

Acquittal means discharge from prosecution, by order of the Court, made upon a verdict of not guilty, or a successful plea of pardon, or of autrefois acquit or convict (*q.v.*), in cases where the indictment is good in law and sufficient to support the verdict or plea. It is less correctly applied to discharge, upon failure of the prosecution on a question of law, without reference to the facts. On acquittal, an entry was made on the record *ideo consideratum est quod prædictus A. B. de præmissis et quietus* (Hawk., P. C., bk. ii. c. 48, s. 13). Technically, the right to discharge from custody did not arise till the conclusion of the sessions of the Court of trial and payment of gaol fees, but now the prisoner is entitled to be immediately set at large, and all fees for discharge are abolished (55 Geo. III. c. 50, ss. 4, 5, 9, 13; 8 & 9 Vict. c. 114. Acquittal is a bar to any subsequent prosecution for the same offence; Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 33; 1 Russ. on *Crimes*, 5th ed., 38–49; Arch. Cr. Pl., 21st ed., 148–52; 1 Stephen, *Hist. of Crim. Law*, 457).

On acquittal, the accused seems to be entitled to a copy of his indictment (Arch. Cr. Pl., 21st ed., 204; 3 Russ. on *Crimes*, 6th ed., 463 n). In proceedings before a Court of summary jurisdiction, the dismissal of the charge is effected by order, in the form prescribed by the Summary Jurisdiction Rules, 1886, No. 21. Where the proceeding is for a common assault, instituted by or on behalf of the person assaulted, the defendant, on dismissal of the charge on the merits, is entitled to a certificate of dismissal (24 & 25 Vict. c. 100, ss. 42–45), which protects him from all other proceedings, civil or criminal, in respect of the assault (*Reed v. Nutt*, 1890, 24 Q. B. D. 669; *R. v. Miles*, 1890, 24 Q. B. D. 423). See also AUTREFOIS ACQUIT.

Acquittance.—A release or written discharge of a sum of money or debt due, as where a man is bound to pay money on a bond, or rent reserved upon a lease, and the party to whom it is due, on receipt thereof, gives a writing under his hand witnessing that he is paid; this will be such

a discharge in law that he cannot demand and recover the sum or duty again if the acquittance be produced (*Termes de la Ley*, 15). By sec. 23 of 24 & 25 Vict. c. 98, it is a felony to forge an acquittance or receipt with intent to defraud.

Acreage, Description by.—If one sells land, and is obliged that it containeth twenty acres, this shall be according to the law, and not according to the custom of the country (Gawdy, J., in *Wing v. Earle*, 34 Eliz. 1620, 267).

In *O'Donnell v. O'Donnell*, 1878, 1 L. R. Ir. 284, a testator devised "forty-five acres of certain lands to A., and fifty acres of the same lands to B." It was held that extrinsic evidence was not admissible to show that the testator meant Irish and not statute acres; that by the statutory definition contained in the 5 Geo. IV. c. 74, s. 2 (now repealed by the Weights and Measures Act, 1878), the word acre had received a legal signification, which must be attributed to that word whether used in a will or other voluntary instrument, or in a contract.

By sec. 2 of 41 & 42 Vict. c. 49 (Weights and Measures Act, 1878) an acre is to contain 4840 square yards. It is not clear whether a contract for the sale of land by the customary acre is affected by this Statute. It is probable that such a contract is lawful (*Giles v. Jones*, 1856, 11 Ex. Rep. 393, Elph. 558).

Act.—See JURISPRUDENCE.

Act in Pais (French *pais* or *pays*, the country).—A term used to denote a fact which lies within the cognizance of "the country," *i.e.* a jury, as opposed to matters contained in a record or a deed. In the old law the phrase was sometimes used to distinguish conveyances made otherwise than by record, that is, assurances "transacted between two or more private persons *in pais*, in the country, that is (according to the old Roman law) upon the very spot to be transferred" (2 Black. Com. 294); but more frequently the term has been employed in connection with the law of estoppel to signify an act which raises an estoppel otherwise than by record or by deed.—[See Co. Litt. 352a; *Lyon v. Reed*, 1844, 13 Mee. & W. 309.] See ESTOPPEL.

Act of Attainder.—See ATTAINDER.

Act of Bankruptcy.—See BANKRUPTCY.

Act of God.—An expression in the law, descriptive of events which cannot be foreseen, or which, if they can be foreseen, cannot be guarded against (*R. v. Commissioners of Sewers for Essex*, 1885, 14 Q. B. D. 574); an act of nature direct, violent, sudden, and irresistible, such as storms, tempests, and lightning (*Nugent v. Smith*, 1879, L. R. 1 C. P. D. 423). An extraordinary fall of snow or rain, an extraordinary high tide, and an extraordinarily severe frost, such as could not have been

reasonably foreseen and guarded against, are held to be exceptional events of this kind, but not a fog which is an ordinary peril of navigation (*Liver Alkali Co. v. Johnson*, 1874, L. R. 9 Ex. 338; *Hill v. Scott* [1895], 2 Q. B. 371). The term "act of God" is not synonymous with that of "inevitable accident" (*Forward v. Pittard*, 1785, 1 T. R. 27, 1 R. R. 142). See ACCIDENT. All causes of inevitable accident may be divided into two classes: Those which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause; and those which have their origin, either in the whole or in part, in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. The term "act of God" is applicable only to the former class (*Nugent v. Smith*, *supra*). Nor must cases in which a contract is discharged by the occurrence of an act of God, be confused with those in which the discharge takes place through a subsequent impossibility of performance, not expressly provided against in the terms of the contract (*Anson, Law of Contract*, 5th ed., p. 274). When the law creates a duty, and the party is disabled from performing it, without any default of his own, by the act of God, the law will excuse him; but where a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity (*per Mellish*, L. J., *Nichols v. Marsland*, 1875, L. R. 10 Ex. D. 255).

The act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, when it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract (*per. cur.* in *Baily v. De Crespigny*, 1869, L. R. 4 Q. B. 180).

A common carrier is liable to the owner for the loss of or damage to goods bailed to him for carriage, but he is discharged if he can show that an act of nature proved the sole, direct, and irresistible cause of the loss. In order to show that the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution, under the circumstances, could it have been prevented (*Nugent v. Smith*, *supra*).

One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable to an action for an escape of the water which injures his neighbour, if the escape be caused by an act of God, in the sense that it is practically, though not physically, impossible to resist it (*Nichols v. Marsland*, *supra*). If a sea bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the liability to repair the damage thus caused to the wall falls not upon the owner but upon the whole of the level (*R. v. Somerset*, 1799, 8 T. R. 312; 4 R. R. 659; *Keighley's case*, 1609, 10 Rep. Ch. 139; *Commissioners of Sewers for Fobbing v. R.*, 1886, Adm. 449; see generally Brodm's *Legal Maxims*, 5th ed., 230; Beven, *Negligence in Law*, vol. i. p. 91).

Act of Parliament.—Statutes or Acts of Parliament are made by the King's Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in Parliament assembled. (See *Black. Com.* i. 85; *Prince's case*, 8 Co. Rep. 20.)

The Statute *Revocatio novarum Ordinationum* (15 Edw. II.) provides that laws are to be made in Parliament by the king and by the assent of the prelates, earls, and barons, and the commonality of the realm.

The royal assent to a bill is given by the sovereign in person or by

commission. If the royal assent is given by commission, it can only be given to such bills as are included in a schedule annexed to the commission.

Formal promulgation is not necessary to make an Act binding. An Act comes into force on the day it receives the royal assent.

Where the commencement of an Act is not provided for in the Act itself, the date endorsed on the Act, stating when it has passed and received the royal assent, is the date of its commencement (see 33 Geo. III. c. 13).

Where an Act, passed after the first of January 1890, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day. See Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 36.

Acts of Parliament may be repealed expressly or by implication. Where an Act passed after the year 1850 repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment. And where an Act, passed after the year 1850, repeals wholly or partially any former enactment, and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into operation. See Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 11.

Acts of Parliament may be classified as follows:—

1. Public Acts—

(a) General, *i.e.*, with reference to the whole empire, or one of its main subdivisions;

(b) Local, *i.e.*, relating to a subordinate area in a constituent part;

(c) Personal, *i.e.*, relating to incorporations of trading bodies, etc.

2. Private Acts, relating to the affairs of individuals—

(a) Printed;

(b) Not printed.

See ADOPTIVE ACT.

Every Act passed after the year 1850 is a public Act, and has to be judicially noticed as such, unless the contrary is expressly provided by the Act. See Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 9.

The Interpretation Act, 1889, provides as follows for the citation of Acts of Parliament:—In any Act, instrument, or document, an Act may be cited by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed; and where there are more Statutes or Sessions than one in the same regnal year, by reference to the Statute or the Session, as the case may require; and where there are more chapters than one, by reference to the chapter; and any enactment may be cited by reference to the section or sub-section of the Act in which the enactment is contained. See Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 35.

The Short Titles Act, 1896, c. 14, provides short or collective titles for a large number of Acts.

A number of words used in Acts of Parliament are defined by the Interpretation Act, 1889, c. 63.

England in an Act of Parliament includes Wales and Berwick-upon-Tweed (see 20 Geo. III. c. 42, s. 3).

An expression of time in Act of Parliament in the case of Great Britain means Greenwich mean time. See Statutes (Definition of Time) Act, 1880, c. 9.

Several Acts are continued by the Expiring Laws Continuance Act, which is passed every year.

The Rules Publication Act, 1893, provides for the making of statutory rules under an Act of Parliament. See RULES.

The revised editions of the Statutes are based on the edition of the Record Commissioners, known as the Statutes of the Realm, which commence with the provisions of Merton in the 20th year of Hen. III. (1235-36), and extend to the end of the reign of Queen Anne (13 Anne).

Statutes subsequent to that date up to the 10th Geo. III. (A.D. 1770) are printed from the Queen's printers' folio copies, the numbering of chapters and sections and the marginal notes (subject to some corrections) having been supplied when wanting in those copies from Ruffhead's edition. For the period from the 11th Geo. III. (A.D. 1770) to the end of the last Parliament of Great Britain in 41 Geo. III. (A.D. 1800), the text followed is that of the original King's printers' copies of the Acts, but the marginal notes are revised.

[See *Statutes of the Realm*; *Revised Statutes*; *Annual Volumes of Statutes*; *Chronological Table and Index of the Statutes*, 13th ed.; *Hardcastle, Statute Law*; *Maxwell on the Interpretation of Statutes*; *Dwarris on Statutes*; *Chitty, Statutes*; *Strickland, Chronological Table of Public General Acts in Force*.]

Act of Settlement.—The Statute 12 & 13 Will. III. c. 2, is properly styled "An Act for the further limitation of the Crown and better securing the rights and liberties of the subject."

Like the Bill of Rights, the Act of Settlement deals with three topics—a settlement of the succession to the Crown; a statement of the conditions under which the Crown may be held; a variety of constitutional provisions. Only, in the Bill of Rights, these last profess to declare existing rights and liberties; in the Act of Settlement, they make avowed changes in the law.

The Act consists of four clauses. The first makes a settlement of the Crown supplementary to that of the Bill of Rights. The second re-enacts the conditions as regards religion, upon which the Crown may be held. The third (1) provides a further security that the sovereign shall be in communion with the Church of England; (2) guards against the results of the king of England being a foreigner; (3) endeavours to secure the responsibility of ministers, and the independence of the House of Commons and the judicial Bench. The fourth re-enacts and confirms all laws for the security of the established religion, and the rights and liberties of the people.

1. It was necessary that the Parliament which met on February 6, 1700-1, should re-settle the succession to the Crown. The Bill of Rights had contemplated heirs of the body of Mary, of Anne, or of William; but Mary died in 1694; and the young Duke of Gloucester, the only survivor of Anne's many children, died in 1700. The limitations of 1689 were clearly insufficient. The Act of Settlement, s. 1, recites those limitations, the death of Queen Mary and of William, Duke of Gloucester, and the risk of a failure in the line of succession; it then enacts that, after the death of William and of Anne, and in default of issue of either, Sophia, Electress and Duchess-Dowager of Hanover, daughter of Elizabeth, Queen of Bohemia, daughter of James I., is next in succession in the Protestant line to the imperial crown and dignity; and that from and after the deaths of

William and Anne without issue, the crown and regal government of these realms shall remain and continue to the said Sophia and the heirs of her body, being Protestants. Such was the Settlement.

2. Sec. 2, like the Bill of Rights, provides for the forfeiture of the Crown, if the holder of it is reconciled to, or enters into communion with, the See of Rome, or marries a Papist. He or she must take the coronation oath, and make the declaration against the doctrine of transubstantiation.

3. Sec. 3 first adds a religious security. The Bill of Rights had provided^e only against the influence of the Church of Rome; now, the possessor of the Crown must join in communion with the Church of England, as by law established.

If the king of this country was a foreigner, the nation was not to be involved in war for the defence of foreign dominions of the king "without the consent of Parliament." No Statute could provide against the complications of our foreign policy which must necessarily arise when our king is also a foreign sovereign.

The holder of the crown might not leave the dominions of England, Scotland, or Ireland without consent of Parliament. This provision was repealed almost immediately after it came into force by 1 Geo. I. st. 2, c. 51, in its turn repealed by the Statute Law Revision Act, 1867.

"All matters and things relating to the well-governing of the kingdom, which are properly cognisable in the Privy Council by the laws and customs of this realm, should be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same." This struck at the practice, now becoming settled, of determining matters of State policy at meetings of an inner council, of whose proceedings no record was kept, nor was its existence known to the law. See CABINET COUNCIL. Here the departments of government were set in motion, while to the Privy Council were left such matters only as needed the formal assent of the Crown in Council. Long before the Act came into force, it was plain that executive business could not be settled by a large body of diverse political opinions, nor could responsibility be thus fixed on the individual members of such a body. The provision was repealed by 4 & 5 Anne, c. 20, s. 27.

No person born out of the United Kingdom or its dominions, though naturalised or made a denizen (*q.v.*), is capable of being in the Privy Council or either House of Parliament, or holding any office or place of trust, civil or military, or having a grant of lands or hereditaments made to him, or in trust for him by the Crown. These disabilities were modified by 7 & 8 Vict. c. 66, while by 33 & 34 Vict. c. 14, an alien (*q.v.*) has all the proprietary rights of a British subject, save as to the ownership of a British ship, and a naturalised alien is for all purposes, proprietary and political, a British

Persons holding office or place of profit under the king, or pension from the Crown, were disabled from sitting in the House of Commons. The exclusion of the ministers of the Crown from place or voice among the representatives of the people would have been the result of this attempt to secure the independence of the House of Commons. The provision was repealed by 4 & 5 Anne, c. 20, s. 28, and a step made towards putting the matter on a reasonable footing by the Place Bill of 1707.

Judges' commissions were to be made *quamdiu bene se gesserint*, and their salaries ascertained and established; but on the address of both Houses it should be lawful to remove them. Thus were the judges withdrawn from the capricious action of the Crown, and brought under the

control of Parliament. The provision is substantially re-enacted in the Judicature Act, 1873, and is therefore repealed by 44 & 45 Vict. c. 59.

No pardon under the Great Seal of England is pleadable in bar of an impeachment. This provision secured the responsibility of the minister, and stayed the Crown from assuming a responsibility which it was impolitic to incur.

4. Sec. 4 does no more than confirm existing laws made for the security of religion and the freedom of the subject.

Act of State.—This term is sometimes made use of in a wider sense to describe the lawful acts of the Executive Government, that is to say, of the Crown and its servants. In *Esposito v. Bowden*, 1857, 7 EL. & BL. 763, Willes, J., says of a declaration of war, that “as an act of State done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law”; and see *Musgrave v. Pulido*, 1879, 5 App. Cas. 111. Where the legality of such an act is called in question in an action against a servant of the Crown by a British subject, it is not enough for the defendant to plead that it was an act of State; he must also show that it was lawful, any unlawful interference with the person or property of the subject being actionable (*Fabrigas v. Mostyn*, 1773, Cowp. 161; 20 St. Tri. 229; *Entick v. Carrington*, 1765, 13 St. Tri. 1030; *Walker v. Baird* [1892], App. Cas. 491). The last was an action of trespass against the commander of a ship of war for entering and taking possession of the lobster factories of the plaintiff on the coast of Newfoundland. He pleaded that he had acted under the orders of the Crown, for the purpose of enforcing a convention or *modus vivendi* with France; and that the matters set forth on which he rested his defence were acts and matters of State arising out of the political relations between Her Majesty and the French Republic, and that they involved the construction of treaties and of the said *modus vivendi* and other acts of State, and *were matters which could not be inquired into by the Court*. Lord Herschell, delivering the judgment of the Privy Council, on appeal from Newfoundland, dismissed as wholly untenable the suggestion that the defendant’s proceedings could “be justified as acts of State, or that the Court was not competent to inquire into a matter involving the construction of treaties and other acts of State.” The Privy Council would appear to have contented itself with affirming the jurisdiction of the Courts to inquire into the legality of such alleged acts of State, and to have abstained, in the way the case came before it, from deciding whether the particular justification would have been good if properly pleaded.

The immunity extended to the Irish Viceroy by the Irish Court ~~seemingly~~ seems to be in accordance with the principles laid down in the English cases. See *Tandy v. Lord Westmoreland*, 1800, 27 St. Tri. 1246; *Luby v. Wodehouse*, 1865, 17 Ir. Com. L. 618; *Spencer v. Sullivan*, 1872, 6 Ir. R. Com. L. 173, where it is laid down that, for an act done by the Lord-Lieutenant as Viceroy of this kingdom in his official capacity, no action can be maintained against him in this country, where he exercises the supreme authority vested in him by the Crown, and while he bears that authority. By 21 Geo. III. c. 70, s. 1, the Indian Courts are prohibited from exercising jurisdiction against the Governor-General of India, or the Governors of Madras, Bombay, or any member of their Councils, in respect of anything done by them in their public capacity.

The term "act of State," however, is often used in a more restricted sense to denote warlike or other acts done by the authority of the Crown, affecting the rights of aliens (*q.v.*) out of the Queen's dominions. Such acts are not cognisable by our municipal Courts; and in regard to them the plea of act of State may be rightly raised to oust the jurisdiction of the Courts. Aliens within the Queen's dominions are subjects bound by a local allegiance (*Calvin's case*), and, as such, within the protection of our municipal law. When it has been desired to expel them, or to extradite them, statutory authority has been taken by Alien Acts and Extradition Acts. But, as regards aliens out of the Queen's dominions, the Crown being the representative of the nation in its foreign relations ("what is done by royal authority, with regard to foreign powers, is the act of the whole nation," 1 Black. *Com.* 252), such acts cannot be questioned in our Courts, and redress must be obtained, if at all, by diplomatic means. In *Buron v. Denman*, 1848, 6 St. Tri. N. S. 525; 2 Ex. Rep. 167, it was held that the forcible seizure and liberation of slaves owned by an alien in territories out of the dominions of the Crown, by a British naval officer acting under the orders of the Crown, was an act of State for which no action would lie by the foreigner against the officer. In this case the officer pleaded that he had acted under the authority of the Crown, but it was only proved that the Crown had ratified his acts; it was, however, held that a subsequent ratification by the Crown was equivalent to a prior command (as to this, see also *The Rolla*, 1807, 6 Rob. C. 364; *The Franciska*, 1855, 2 Spink. 113; *Feather v. R.*, 1866, 6 B. & S. at p. 296). It is in cases regarding the Native States of India that the doctrine as to such acts of State being beyond the jurisdiction of the Courts has been most fully illustrated (see the collection of cases in a note to *Bedreechund v. Elphinstone*, 1830, 2 St. Tri. N. S. at p. 449. In *The Nabob of Arcot v. The East India Company*, 1793, 4 Bro. C. C. 100; 2 Ves. Jun. 56, a bill claiming an account from the East India Company (which then exercised sovereign powers by delegation from the Crown) was dismissed as involving a question of treaties and acts done by the Company in their political capacity. Similarly, in *The Secretary of State in Council of India v. Kammachee*, 1859, 13 Moo. P. C. 22, the alleged seizure by the Company of the private property of the late Rajah of Tanjore, on his decease without heirs, was held to be an act of State into which municipal Courts had no jurisdiction to inquire. This doctrine of act of State does not, however, apply to British India, which is part of the dominions of the Crown, owned by the Crown in full sovereignty, the inhabitants of which are British subjects and, as such, under the protection of the law. In *Forester and Others v. The Secretary of State for India in Council*, 1872, L. R. Ind. Ap. Sup. Vol. 10, a claim in respect of lands seized by the Indian Government on the death of the Begum Samroo was held to be within the jurisdiction of the Courts, on the grounds that the Begum was not a sovereign princess, but a British subject holding lands in British India under a legal tenure. The control and authority exercised by the Government of India, as the paramount power over the Native States, is, on the above principles, outside the jurisdiction of our municipal Courts. These powers are sometimes so large as to raise the question whether the whole sovereignty has not been absorbed, and the native territory incorporated, in the Queen's dominions, in which case there would be no longer room for acts of State in the restricted sense (see Tupper, *Our Indian Protectorate*; Warner, *The Protected Princes of India*; *Rul. Cas.* i. 821). See also ABSOLUTE PRIVILEGE. •

Acting Drama.—See COPYRIGHT.

Actio personalis moritur cum persona.—A personal action dies with the person. At the present day, however, it is by no means true that a personal action always dies with the person. In the older English law the maxim was of general application; it extended • both to actions based upon an obligation, and to all actions based on tort (*per* Bowen, L. J., *Phillips v. Homfray*, 1883, 24 Ch. D. 439; *Finlay v. Chirney*, 1888, 20 Q. B. D. 494).

In modern times, however, the scope of the principle expressed in the maxim has been limited to actions of tort, and has not been applied to such personal actions as are founded upon any obligation, contract, debt, covenant, or any other duty to be performed (1 Wms. Saun. 240, s. 6). If a contract, however, is personal to the testator or intestate, no liability attaches to the personal representatives, unless a breach was incurred in the lifetime of the deceased (*Williams, Executors*, 3rd ed., 1597; *Hyde v. Dean of Windsor*, Cro. (1) 552; *Siboni v. Kirkman*, 1836, 1 Mee. & W. 418). The rule was at one time extended to actions of debt, which did not lie against the personal representatives on simple contract, except for rent (*Norwood v. Read*, Pl. Com. 180; *Williams on Executors*, 3rd ed., 1351, 1513), unless the undertaking to pay originated with the representative (*Riddell v. Sutton*, 1828, 5 Bing. 206); the technical reason for this being that before the abolition of wager of law, an executor or administrator, where charged for the debt of the testator or intestate, was not admitted to wage his law, thus being deprived of a legal defence which the deceased himself might have made use of (*Pinchou's case*, 1612, 9 Co. Rep. 86; *Barry v. Robinson*, 1805, 1 Bos. & P. N. R. 293), but as this reason did not apply to an action of assumpsit (see ASSUMPSIT) on the case, such an action for the payment of a debt might always have been brought against the representative. Wager of law was abolished in 1833, by 3 & 4 Will. IV. c. 42, s. 13; sec. 14 of this statute enacted that an action of debt on simple contract should be maintainable in any Court of common law against an executor or administrator.

Although an action for a mere tort, such as assault or slander, dies with the wrong-doer, where, besides commission of the wrong, property is acquired which benefits the deceased, an action for the value of the property survives against the representative (*Hambly v. Trott*, 1776, Cowp. 371, Lord Mansfield, C. J.). Bowen, L. J., sums up the law on the subject as follows:—

“The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person, who has done the act, are those in which property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person, and added to his own estate or moneys. In such cases the action, though arising out of a wrongful act, is in substance brought to recover property or its proceeds or value, and does not die with the person. It is not every wrongful act, by which a wrong-doer indirectly benefits, that falls under this head, if the benefit does not consist in the acquisition of property or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued, merely because it was worth the wrong-doer's while to commit the act

which is complained of, and an indirect benefit may have been reaped thereby" (*Phillips v. Homfray*, *supra*).

Actions for breach of promise of marriage may be maintained by the representatives of the injured party, or against the representatives of the wrong-doer, only if special damage is alleged and proved. In *Chamberlain v. Williamson*, 1814, 2 M. & S. 408; 15 R. R. 295, an action was brought by the representative of a deceased, against a living, person for breach of promise. It was held that an action of the sort, in which no special damage was alleged, would not lie, on the ground that, except when such special damage had been occasioned, the action was in reality an action arising out of a personal injury. "Executors and administrators are the representatives of the temporal property, that is the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate" (Lord Ellenborough, S. C.). The converse case arose in *Finlay v. Chirney*, 1888, 20 Q. B. D. 494, where an action for breach of promise of marriage was brought against the personal representatives of the promiser. It was held that without proof of special damage, the action did not survive; and that the special damage which would cause the right of action to survive must be damage to the property, and not to the person of the promisee, and must be within the contemplation of both parties at the date of the promise, and that the action can be brought against the executors for such special damage only, and not for general damages. Actions of this kind, although in form and substance contractual, differ from other forms of actions *ex contractu*, in permitting damages to be given as for a wrong. The Courts will even, although an action for breach of promise be an action arising out of contract, apply the general principles of the maxim *actio personalis* to so much of the damages as are a remedy for mere personal wrong, and will allow so much of the remedy to survive as seems to belong to the ordinary category of an action *ex contractu* (*per* Bowen, L. J., *Finlay v. Chirney*, *ubi supra*).

The rule under consideration was first altered in 1330 by the Statute 4 Edw. III. c. 7, which recites that, whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life, and enacts that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner, as they, whose executors they be, should have had, if they were in life. This enactment was construed to extend to administrators (*Smith v. Colgay*, 1595, Cro. (1) 384), and the right was extended to executors of executors by 25 Edw. III. stat. 5, c. 5.

This Statute, being remedial in its nature, and also those amending it, have been construed very liberally; they have been held to extend to all ~~torts~~ except those relating to the testator's freehold, and those where the injury done is of a personal nature (*per* Bramwell, L. J., *Twycross v. Grant*, 1878, 4 C. P. D. 40).

Wherever a breach of contract or a tort has been committed in the lifetime of a testator, his executor is entitled to maintain an action, if it is shown upon the face of the proceedings that an injury has accrued to the personal estate (Brett, L. J. S. C.).

An action for defamation, either private character or of a person in relation to his trade, comes to an end on the death of the plaintiff; but an action for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate, survives. So, in *Hatchard v. Mige*, 18 Q. B. D. 771, it was held that a claim for falsely and maliciously pub-

a statement calculated to injure the plaintiff's right of property in a trade mark, was put an end to by the death of the plaintiff after the commencement of the action, only so far as it was a claim for libel, but that, in so far as the claim was in the nature of slander of title, the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage. An action to restrain the infringement of a registered trade mark does not fall within the rule, but where brought in respect of injury to the property of the owner of the mark can be continued by his executors (*Oakey v. Dalton*, 1887, 35 Ch. D. 702). See *Kirk v. Todd*, 1882, 21 Ch. D. 484.

Where the cause of action is in substance an injury to the person, the personal representatives cannot maintain an action, merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury (*Pulling v. The Great Eastern Ryw. Co.*, 1882, 9 Q. B. D. 110).

A further alteration of the law was made in 1833, by Statute 3 & 4 Will. IV. c. 42, which provided a remedy for injuries to the real estate of a deceased person, and for injury by a deceased person to another in respect of his property.

Sect. 2 enacts that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person.

Before this Act, an action founded in tort, and in form *ex delicto*, could not be maintained against the personal representatives of the wrong-doer, in respect of a tort to the property of another, such as trespass, trover, waste, diverting a water-course, or obstructing lights (1 Wms., Saund. 214, 2 (1)). Apart from this Statute, where chattels, wrongfully in the possession of the testator, continued *in specie* in the hands of his representative, detainee would have been maintainable to recover the specific goods (*Le Mason v. Dickson*, 1627, Jones W. 173, 174).

In an action in respect of permissive waste, by non-repair of premises, brought by remainder-man in fee against executor of tenant for life, it was held that the executor was liable under the above Statute (see *Jones v. Simes*, 1890, 43 Ch. D. 607).

An action for waste is not a claim simply depending on tort; it depends on implied contract or obligation (*Batthyany v. Walford*, 1887, L. R. 36 Ch. D. 278).

The representatives of a trustee or of a person occupying a fiduciary position, will be liable for wrongful acts, in respect of which an action would have been maintainable against the testator or intestate (*Concha v. Murietta*, 1889, 40 Ch. D. 553; *New Sombbrero Phosphate Co. v. Erlanger*,

1876, 5 Ch. D. 73; *Ramskill v. Edwards*, 1885, 31 Ch. D. 100; *Batthyany v. Walford*, *supra*; *Smith v. Blyth* [1891], 1 Ch. 366).

At common law an executor or administrator cannot maintain an action for the loss of the life of the testator or intestate (*Higgins v. Butcher*, 1606, Yelv. 89; *Baker v. Bolton*, 1808, 1 Camp. N. P. 493; 10 R. R. 734). "In a civil Court, the death of a human being cannot be complained of as an injury" (*per* Lord Ellenborough).

In *Osborn v. Gillett*, 1873, L. R. 8 Ex. 88, it was held (Baron Bramwell *diss.*) that a master cannot maintain an action for injuries which cause the death of his servant. Baron Bramwell maintained that the maxim *actio personalis* clearly meant that the right of action died with the person who was to be party to the action as plaintiff or defendant, and did not apply to the entirely different cause of action possessed by the master. This view is strongly supported by Sir F. Pollock, *Law of Torts*, 4th ed., p. 57.

An important qualification of the common-law rule in this respect was effected by the measure known as Lord Campbell's Act, 1846, 9 & 10 Vict. c. 93, amended by the Act 1864, 27 & 28 Vict. c. 95.

It confers a right of action on the personal representatives of a person whose death has been caused by a wrongful act, neglect, or default, such that, if death had not ensued, that person might have maintained an action; but the right conferred is not for the benefit of the personal estate but "for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused."

Lord Campbell's Act does not confer on the personal representatives the right of action which the deceased would have had if he had survived, but gives to them a totally new right of action beyond it, and based on a different principle. In such an action, no compensation can be given by way of *solatium* for grief or loss of the society of the deceased. There must be a reasonable expectation of pecuniary benefit, as of right or otherwise, had the deceased remained alive. The security given by the Statute is to individuals and not to a class (*Blake v. Midland Railway Co.*, 1852, 18 Q. B. 73; *Franklin v. South-Eastern Railway Co.*, 1858, 3 H. & N. 211; *Pym v. Great Northern Railway Co.*, 1868, 4 B. & S. 406). See CAMPBELL'S (LORD) ACT, 1846.

Practice.—Where the cause of action survives, a cause or matter does not now become abated by reason of the marriage, death, or bankruptcy of any of the parties, and does not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*; and whether the cause of action survives or not, there is no abatement by reason of the death of either party between the verdict or findings of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death (*R. S. C.*, Order 17, r. 1). See ABATEMENT.

However, a suit for divorce is at an end by the death of one of the parties, after a decree *nisi* for dissolution of the marriage has been pronounced (*Stanhope v. Stanhope*, 1886, 11 P. D. 103), where it was held that the legal personal representatives of the husband could not revive the suit for the purpose of applying to make the decree absolute.

In *Bowker v. Evans*, 1885, 15 Q. B. D. 565, it was held that, where an action for a pure tort has been referred to arbitration, it is at an end by the death of one of the parties, after the hearing and before award, although the order of reference contained a clause that the arbitrator should publish his award, ready to be delivered to the parties or their respective personal representatives, if either should die before the making of the award, on the

ground that the agreement for reference affected merely the mode of trial, and did not avail to alter the rights of the parties.

Action on the Case.—Case, or action on the case, was the name formerly given to an important class of actions for which there was no established form or writ (see ACTIONS); and although special forms of actions have been abolished by the Judicature Acts, the above term is frequently used to designate actions which would have fallen within the class of actions previously described by that name. The writ in an action on the case was first introduced by the repealed Statute of Westminster the Second (13 Edw. I. c. 24), which provided that whensoever a writ should be found in Chancery, and in a like case falling under the same right, and requiring a like remedy, no precedent of a writ could be produced, the clerks in Chancery should agree in forming a new one, and if they could not so agree, it should be adjourned to the next parliament, where a writ should be framed by consent of the learned in the law.

An action on the case was, strictly speaking, an action for the recovery of damages for an injury (by nonfeasance, misfeasance, or malfeasance (*q.v.*)), not committed with force, or to a thing not tangible, or happening consequentially, or to an interest in reversion; but it has been more generally described as an action brought to recover damages for a loss or injury arising indirectly, or consequentially, from the act complained of (see *The Common Law Commissioner's First Report*, 1851, p. 31). Thus, various causes of action, in respect of injuries resulting indirectly from a trespass, were known by the name of trespass on the case, by reason of their analogy to the old action of trespass, the distinction between the action of trespass and that of trespass on the case being, that in order to support an action of trespass the injury must have been shown to have been effected by the immediate act complained of, whereas, if the injury was merely consequential upon the act, the proper remedy was by action on the case (*Day v. Edwards*, 1794, 5 T. R. 648). As an illustration of this, it was said that if a man threw a log into a highway, and it hits a person there, such person might maintain an action of trespass against him because of the immediate wrong; but if, while the log was lying in the highway, a person tumbled over it and was thereby injured, such person could only bring an action upon the case, because the injury was not immediately consequent on the throwing of the log (*Reynolds v. Clarke*, 1722, 1 Stra. 636). So, where an injury has resulted to a person from a breach of duty on the part of another, as, for instance, by the proprietor of a house allowing rain water to be discharged from the eaves of his house on to his neighbour's land, and thereby causing an injury to the land, the remedy was by an action on the case. Slander, whereby a person's character was injured, gave a right of action on the case; and trover, which lay for the wrongful conversion of goods, and *assumpsit*, which was an action for damages for breach of a contract made otherwise than by deed, were both species of actions on the case (Stephens, *Pleading*, 7th ed., p. 13). •

By the Statute of Limitations, actions upon the case (not for slander) must be commenced within six years next after the cause of such actions, and not after (21 Jac. I. c. 16, s. 3).

Actions.—At an early stage of the history of the law of England—as also of the law of Rome, France, and other continental nations—an

attempt was made to group all legal proceedings under certain defined heads. And in each case the classification was unfortunately based, not so much on the right which the plaintiff desired to assert or enforce, as on the nature of the wrong done by the defendant, or the remedy which it was sought to apply to the case. It was, in short, a classification of the usual subjects of litigation; and to each class was allotted its appropriate *formula* of complaint or claim. In England such a *formula* was an essential part of the "original writ" (*breve originale*), with which the litigation commenced. The plaintiff's rights were regarded as synonymous, or as co-extensive, with his cause of action; and even his cause of action was limited to cases in which an appropriate *formula* was known to the officers of the Court. Writs had been provided—when or by whom we know not—for the most obvious kinds of wrong; but when, in the progress of society, novel causes of complaint arose, it was found that they were not covered by any of the writs in vogue. And the clerks of the Chancery (whose duty it was to prepare the original writ for the suitor) had apparently no power to devise a new *formula* to meet the case. They had before them an authoritative list of all the recognised forms of action; and this they regarded as an exhaustive catalogue of the injuries for which the law of England provided redress. If there was no *formula* to fit the case, the person injured had no remedy.

To meet this difficulty, the Statute of Westminster the Second (13 Edw. I. c. 24) was passed, which provided, "That as often as it shall happen in the Chancery, that in one case a writ is found, and in a like case (*in consimili casu*) falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the Chancery shall agree in making a writ, or adjourn the complaint to the next parliament." The clerks of the Chancery made liberal use of the power thus conferred on them. But it will be observed that they still had no power to deal with cases entirely unprecedented; they could only frame new writs analogous to those previously existing (compare the Roman *actio utilis*). Parliament, indeed, from time to time added new writs; but it still remained the law of England, down to 1875, that a plaintiff could only sue in one or other of certain defined and recognised forms of action; his writ must either be according to one of the ancient original forms, or *in consimili casu* therewith, or justified by some statute. If the plaintiff selected the wrong form of action, judgment went against him, and he had to pay the defendant's costs, although he was clearly entitled to recover on a different writ (see *White v. Great Western Ry. Co.*, 1857, 2 C. B. N. S. 7). There were three different classes of actions—real, personal, and mixed. There were three real actions (dower, writ of right of dower, and *quare impedit*), and prior to 3 & 4 Will. IV. c. 27, there were many more. There was one mixed action, ejectment (see RECOVERY OF LAND). There were seven principal forms of personal actions: debt, covenant, assumpsit, detinue, trespass, trespass on the case, and replevin, each of which is dealt with hereafter under a separate heading. And in some cases it was only by a costly process of elimination that a plaintiff could ascertain which was his proper remedy; for the Court never decided that no action lay on the facts stated to it, but only that no action lay in the particular form which the plaintiff had been advised to select.

But all difficulty of this kind was removed by the Judicature Act, 1875. Forms of action are now in fact abolished. The plaintiff states the material facts upon which he relies, and claims the relief which he desires; there is no longer any necessity for him to specify the form of action in which he would formerly have had to seek that relief; for that is a conclusion of law, and he may safely leave the Court to draw the proper inference from the

facts which he proves at the trial (*Hanmer v. Flight*, 1876, 24 W. R. 346; 35 L. T. 127).

Actions in the High Court.—In the more extended meaning of the word action, which has prevailed since the Supreme Court of Judicature Act, 1873, what were formerly known as actions at law, as well as suits in Chancery, in the Admiralty and the Probate Courts, are all included. Sec. 100 of that Act defines an action as “a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court, and (not including) a criminal proceeding by the Crown.” This excludes suits for divorce, to which the rules of Court under the Act do not apply, as well as bankruptcy proceedings, where, in both cases, the proceedings are commenced by petition. See BANKRUPTCY; DIVORCE. A distinction is also thus made between actions and other proceedings; for, while the general word “cause” includes all proceedings between a plaintiff and defendant, and any criminal proceedings, “matter” includes any proceedings in the Court not in a cause. Thus those originating summonses which take the place of the old Chancery suits for the administration of the estate of a deceased person, or of trusts, and foreclosures, and redemptions of mortgages, commence proceedings which are actions (*In re Fawsitt*, 1879, 53 L. T. 271), conformably to the definition; though there is no writ, and there are no pleadings, and the proceedings are in chambers; whereas in actions, the proceedings are in Court, and the chief characteristic of them, though the rules for dispensing with written pleadings and the establishment of the Commercial Court (*q.v.*) are signs of a tendency to dispense with them as far as is yet possible, is the raising of the questions in issue between plaintiff and defendant by their means. See PLEADINGS.

Examples of “matters,” on the other hand, which may be mentioned, the proceedings in which are not prescribed by rules of Court, but are taken under various statutes for the purpose of a summary settlement of questions to which they give rise, are the originating summonses taken out under the Conveyancing Act, 1881, the Settled Land Act, 1882, sec. 17 of the Married Women’s Property Act, 1882, for the settlement of disputes between husband and wife as to the wife’s property, and many others which are raised by these originating summonses, as all summonses not in a cause are now called, though formerly the name was restricted to those which are now the commencement of actions.

These distinctions of cause, action, matter, have various practical consequences, *e.g.* whether a proceeding is an action or not may affect the mode of trial; if it is an action, the proper mode of trial may be by jury; if not, by a judge without a jury, or otherwise. Moreover, the time of appealing, unless special leave is obtained from the Court of Appeal, in the case of a final judgment in an action is three months; while no order, whether final or interlocutory, in any matter not an action, can be appealed from after the expiration of fourteen days. See APPEALS.

The writ or letter missive from the sovereign, from the date of issue of which the action commences—an important point in regard to the period of limitation under the Statutes of Limitation (*q.v.*)—is called a writ of summons. It is issued from the Central Office of the Supreme Court, or from a District Registry (*q.v.*), when it is desired to commence the action there, at the instance of the plaintiff or his solicitor, and calls upon the defendant to appear and answer the demand of the writ, in default whereof within a fixed time, usually eight days, judgment will be given against

him (see APPEARANCE). The writ of summons must be served within twelve months from its date, or, if renewed, as it may be within the year, then within six months from the renewal, and so on until service is effected, either personally or by the acceptance of service (*q.v.*) by a solicitor on the defendant's behalf, or in some other mode which may be directed by the Court. There is no officer of the Court whose duty it is to serve the writ, and the person who serves it must, within three days, indorse the fact of service on the writ, and afterwards, if judgment is to be signed in default of appearance, he must swear to the fact in an affidavit of service (see AFFIDAVIT).

The writ assigns, according to the nature of the claim, the Division of the High Court in which the action is to proceed. An indorsement on the writ sets out the claim for which the writ is issued, and there must also be indorsed on it the name and address of the plaintiff, and the name and address of the solicitor, if any, who obtains the issue of the writ; and in either case an address for service of documents within three miles of the door of the Courts of Justice, or within the District Registry, if the writ is issued there. See CLAIM, INDORSEMENT OF; and SERVICE OF WRIT, ADDRESS FOR.

The assignment to the various Divisions of the Court follows the old lines of division between the Common Law, Chancery, Probate, Admiralty, and Divorce Courts (see SUPREME COURT). Only a brief indication of the claim is required to be indorsed, sufficient to acquaint the defendant with the character of the demand made; further statement being reserved for the pleadings, if any. But where a debt or liquidated (ascertained) demand in money is sought to be recovered, in that case there may be a special indorsement (*q.v.*), which will serve instead of a statement of claim (*q.v.*). This indorsement is also applicable where the claim is for the recovery of land by a landlord against his tenant, or person claiming under him, on the expiration of a term, or the determination of the tenancy by notice, unless special leave to defend is obtained by the defendant; in such a case a summary mode of obtaining judgment is provided by Order 14.

In actions where the Courts have jurisdiction over the subject-matter of the action, but the defendant is out of the territorial jurisdiction, the writ is issued by leave only; and the time limited for appearance will depend on the country where the defendant is. If the defendant is in Ireland or Scotland, the judge must exercise his discretion in granting leave, as to the comparative convenience of trying the case here or there. When the defendant is neither a British subject nor in British dominions, notice of the writ having been issued takes the place of the sealed copy of the writ itself, with which service is effected within the jurisdiction. Where the defendants are husband and wife conjoined, or an infant, lunatic, or partners, a corporation, or other public body, or if the action is to recover land where no one is in possession, and in Admiralty actions *in rem*, special rules for service are provided. See SERVICE OF WRIT and ADMIRALTY ACTIONS.

After appearance has been entered, and if the indorsement on the writ is a sufficient statement of the nature of the claim, and states that the plaintiff intends to proceed to trial without pleadings, then, within ten days after appearance, the plaintiff must serve twenty-one days' notice of trial without pleadings. The defendant, within ten days' after appearance, may then apply to the judge in chambers (*q.v.*) for the delivery of a statement of claim, which the judge may order; whereupon the pleadings follow; or he may order that there shall be no pleadings; but, if he think fit, that particulars of claim or of defendant's defence shall be given. If no

particulars are ordered, and there are no pleadings, all defences are open to the defendant on the trial. If particulars are ordered, the parties are bound by them. If the defendant does not take out a summons for delivery of a statement of claim, he cannot rely on a set-off, or counter-claim, or on infancy, coverture (if a married woman), Statutes of Limitation, or discharge under the Bankruptcy Acts, unless he gives notice to plaintiff, within ten days after appearance, of such special defence.

• If the indorsement, however, does not comply with the regulations in being a sufficient statement of the nature of the claim, pleadings are not necessary unless a statement of claim is demanded by the defendant. If it is required, the plaintiff has five weeks in which to deliver it. If not demanded, the plaintiff may, within six weeks, deliver one; in each case the party takes the risk of having to pay the unnecessary costs. If the statement is not delivered within the prescribed time, defendant may have the action dismissed for want of prosecution; and where the defendant does not put in his defence within the prescribed time, the plaintiff may proceed to obtain judgment in manner similar to that prescribed in the case of default of appearance (*q.v.*); and by Order 27, according to the nature of the claim made, that is either by at once signing judgment, where that is permissible; or, if accounts and inquiries (*q.v.*) are necessary, or any other proceedings for assessing damages, or otherwise, before the judgment can be given in his favour, then by taking the prescribed course suitable to the particular case.

For the rules of pleading the books of practice must be consulted; and see Odgers' *Principles of Pleading*. They are intended, primarily, to raise issues of fact; but if legal questions are raised, these may either be left to be disposed of at the trial, or, by order, or consent of parties, they may be set down for argument, and disposed of at any time before the trial. This is in lieu of the old practice of demurrer (*q.v.*), which no longer exists.

If the defendant has a set-off or counter-claim (*q.v.*), he may rely on it as if it were a statement of claim in a cross action. But this is subject to the discretion of the judge, if the plaintiff objects that such a proceeding is embarrassing to him. Payment into Court may also be made in satisfaction of debt or damages. But it may be made with a denial of liability; except in cases of libel and slander, where it would obviously embarrass the plaintiff. The plaintiff may accept the money and go on with the action if he thinks it insufficient; and if the defendant's liability is established, but the amount paid in is found to be sufficient to satisfy the claim, he is entitled to judgment and the general costs (*Goutard v. Carr*, 1884, 13 Q. B. D. 598).

A third party, other than the plaintiff and defendant, may also be brought into the action, where the defendant claims a contribution or indemnity from such third party, by the service on him of a third party notice (*q.v.*), served like a writ of summons, and subject to the like rules as to appearance and default. But the plaintiff has the opportunity of objecting to this notice; and it may be refused if it is embarrassing to him. If the third party fail to appear, the defendant may obtain judgment against him, whether he himself defends the action or not.

The same course is open to a defendant against a co-defendant.

Beyond reply (*q.v.*) to the statement of defence, no further pleadings may be served except on leave obtained; and, in general, the reply closes the pleadings.

The plaintiff must then, within six weeks, give notice of trial, and enter the action for trial; and, if he does not, the defendant may do so, or apply

to have the action dismissed for want of prosecution. But in all cases where times are prescribed for taking the steps in an action, they may be extended, if sufficient cause in the opinion of the Court or judge is shown, by orders made in chambers (*q.v.*) on summons.

Before speaking of the different modes in which an action may be tried, it must be noticed that there are certain interlocutory proceedings, either before a master of the High Court, or chief clerk (*q.v.*), or judge in chambers, which are carried on by means of summonses. The object of these is to facilitate the trial of the action itself. They are the administration of interrogatories (*q.v.*) by plaintiff and defendant to each other; the obtaining discovery, and inspection of documents (see DISCOVERY) in the possession or power of the parties; and the admission of facts (see ADMISSIONS). The rule for the administration of interrogatories, for which leave must first be obtained, except in cases of fraud or breach of trust, with a deposit of money by the party seeking to administer them, which shall secure the other party's costs to that extent, at least, if they are administered improperly, is that they are not to be allowed for the purpose of enabling the party to see if he has a case, but to enable him to support his case or see if his case can be supported. A like payment into Court must also be made if discovery of documents is sought.

Documents referred to in pleadings must be produced for inspection on notice. But the production of all documents is subject to any legal exceptions which may be taken; and the order is in the discretion of the judge. Disobedience to any order exposes a party to attachment (*q.v.*), or committal for contempt of Court (*q.v.*), or to have his action dismissed for want of prosecution, or treated as an undefended action, as the case may be. So, too, when notices are given to admit facts or documents, if such admission is not made before trial, the costs of proof will fall upon the party refusing or neglecting in any event; unless the Court certifies that the refusal was reasonable. And not to give such notices is to run the risk of incurring the costs of proof at the trial.

Upon sufficient admissions judgment may be obtained. So, too, if during the proceedings anterior to trial, any issue has been directed to be tried which in the opinion of a party entitles him to move for judgment, and he succeeds in establishing his contention.

In addition to the interlocutory proceedings already mentioned, there may be applications for commissions to take evidence, either abroad, or, in case of illness, etc., of witnesses, in England (see COMMISSION, EVIDENCE ON); for directions as to the mode of trial, whether with or without a jury, with assessors (*q.v.*), by the official or other referee, etc. (*q.v.*). Such applications for directions are often included in one general summons, called a summons for directions (see DIRECTIONS, SUMMONS FOR). So, too, there may be applications in chambers to set aside proceedings for irregularity. Moreover, applications may be so made for remitting actions which by reason of the amount involved (£100 in cases of contract), or otherwise, may be tried in a County Court, to some County Court for trial (see COUNTY COURTS). Before the trial of the cause, frequently, indeed, immediately upon the service of the writ, a mandamus (*q.v.*), or injunction (*q.v.*), may be granted, or an interim receiver (see RECEIVERS) appointed in all cases where it appears to the Court or a judge just or convenient so to do; such interlocutory proceedings being more common in the Chancery than the Queen's Bench Division.

It should be mentioned that a cause no longer becomes abated (see ABATEMENT) by the marriage, death, or bankruptcy of any of the parties, if

the cause of action survive or continue. Provisions are made by the orders and rules for bringing in all necessary new parties, by a simple mode of procedure, to enable the action to be properly carried on. See PARTIES, ADDITION OF.

To speak now of the actual trial of the action. If the action is for slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise to marry, either party may demand a jury. In other cases, trial by judge and jury must be obtained by order. Subject to this, questions of fact may be tried either by a judge, a judge with assessors, or an official or special referee as already mentioned; or, in certain cases, by compulsory reference to an arbitrator (*q.v.*). Commissioners may also be appointed for assizes and otherwise, with the powers of a judge of the High Court. See CIRCUITS.

Whatever be the mode of trial, witnesses are summoned to attend thereat by writs of subpoena *ad testificandum* and *duces tecum* (see SUBPENAS); the latter when they are required to produce documents in their possession or power. Evidence is to be given *viva voce*, and in open Court, at the trial of an action. The parties, however, may have previously agreed that all the evidence shall be taken by affidavit (*q.v.*); or it may have been ordered that any particular facts may be proved by affidavit and read at the trial; or a witness examined, if desirable, before a commissioner or examiner (see COMMISSION, EVIDENCE ON); and provision is made in such cases for the production for cross-examination, if either party desire it, of a witness who has made an affidavit.

As to the mode of summoning juries at trials, and their qualifications; the respective functions of the judge and jury; challenges of jurymen; withdrawal of a juror by consent; discharge of jury without agreement on a verdict (see JURY); as to witnesses; evidence; examination in chief; cross-examination; right of reply; amendment of pleadings; exceptions; stamps on documents put in as evidence; and other like matters relating to the trial,—see under the respective titles.

If the jury find a general verdict for plaintiff or defendant, judgment is usually entered in accordance with it. But the jury may find specific facts, and then the judge causes the judgment to be entered according to the legal effect of the findings; and in neither case is a motion for judgment necessary. Frequently in the case of specific findings by the jury, the judge defers his judgment, and arranges for the matter to be argued on further consideration (*q.v.*). As to the entry of judgment, etc., see JUDGMENT and ASSOCIATE.

If either party impeach the correctness of the verdict of the jury, a new trial may be applied for to the Court of Appeal, on various grounds, *e.g.* misdirection by the judge, or the improper admission or rejection of evidence; but it will only be granted if the Court is of opinion that a serious wrong has been occasioned; and the Court is very averse to granting new trials, except on very strong grounds; and it respects the province of the jury as the judge of facts, if they have had the right facts before them, and have really given their decision upon them. On other grounds also a new trial will be granted, if it can be shown that a miscarriage of justice has taken place, or would take place, if the verdict stood. Thus, if it is shown that new evidence, discovered subsequent to the trial, is now available to the applicant; or that the verdict was obtained by perjury and conspiracy, and so on. But, of course, all this is subject to the discretion of the Court upon the circumstances under which these matters are brought forward.

The application is made on motion, notice of which must be given to the other party within seven or eight days, according as the trial was in London, or at the assizes in the country, and it must allow fourteen days before the hearing. The Court will not stay execution, pending the application, unless under special circumstances, and it may direct the costs of the first trial to abide the result of the second; and if no such direction is given, the costs follow the event of the second trial. See COSTS.

The application to set aside the judgment is also made to the Court of Appeal, and in both cases the Court may draw all inferences of fact, not inconsistent with the finding of the jury; and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly; or may direct the motion to stand over for further consideration, and direct such issues or questions to be tried and determined, and such accounts and inquiries to be taken and made, as it may think fit.

During the course of the preparation for trial, the various interlocutory orders relating to practice and procedure, which have been spoken of, may be appealed from, with leave of the judge, to the Court of Appeal. In cases which do not fall under this head, the appeal from a judge in chambers is to a Divisional Court (*q.v.*); but leave has to be given by the judge, except in cases of injunction, mandamus, appointment of receivers, and where the liberty of the subject is concerned (see Judicature Act, 1894). But all appeals may be taken from the Court of Appeal to the House of Lords without any leave (*Ford's Hotel Co. Ltd. v. Bartlett* [1896], App. Cas. 1).

[See APPEALS; and as to enforcing judgments, see EXECUTION; and for proceedings in County Courts under that title.]

Actions, Popular.—See PENAL ACTION.

Action Burnel (Statute of), intituled in the Statutes of the realm, *Statutum de Mercatoribus*, was ordained by the king and his council at Acton Burnel in 4 Edw. 1. It was intended to give merchants a speedy remedy for the recovery of their debts. Owing to the misinterpretation put upon it by the sheriffs, it failed in its object, until its operation was enlarged by the *Statutum Mercatorum* of 13 Edw. 1. Though it established the Statute Merchant (*q.v.*), it should be noticed that the Statute of Acton Burnel did not enable a creditor to sell any lands of his debtor, except devisable burgages.

Acts of Union; Uniformity.—See UNION; UNIFORMITY.

Actual Annual Income.—See Stroud, *Jud. Dict.*, *in loc.*

Actual Bodily Harm.—Sec. 47 of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, punishes everyone who is convicted of "an assault occasioning actual bodily harm to any person." In *R. v. Clarence*, 1888, 22 Q. B. D. 23, the facts were that a husband, who, to his knowledge, was suffering from venereal disease, had marital

intercourse with his wife without informing her of the fact. As she suffered grievous bodily harm from the infection thereby communicated to her, the question arose whether the husband had been rightly convicted upon an indictment charging him with "unlawfully and maliciously inflicting grievous bodily harm," under sec. 20 of the above Act, and with "an assault upon her," occasioning actual "bodily harm," under sec. 47. It was held by a majority of the judges in the Court for Crown Cases Reserved, that the conduct of the prisoner did not constitute an offence under either section of the Statute, and that the conviction must be quashed.

On an indictment for an assault occasioning actual bodily harm, the defendant may be convicted of a common assault (*R. v. Yeadon*, 1861, L. & C. 81). See Stroud, *Jud. Dict.* ("Inflict").

Actual Capture.—In the law of prize (*q.v.*), the presumption is always in favour of actual capture as against those who claim to be joint captors. Under certain circumstances, claims of joint capture are admitted, but the Prize Court has again and again declared its resolution not to extend the operation of that doctrine. Actual capture may therefore be taken to be the rule which will always be enforced in the adjudication of naval prize, except in cases in which the application of constructive capture is well recognised and established (*per* Dr. Lushington, *Banda and Kirwee Booty*, 1866, 35 L. J. Adm. 17).

Actual Enjoyment.—See PRESCRIPTION.

Actual Entry.—An actual entry upon land is made so soon as the person desiring to make an entry has any part of his body upon the land, and such entry is complete and effectual even though he should immediately afterwards be dragged off by force. If the person entitled be hindered from making an actual entry by fear of violence, he may make an entry in law by approaching as near as he safely may, and there making his claim, which, under such circumstances, will take effect as an actual entry. Proof must be given that an entry in deed could not safely be made. An actual entry upon the lands converts a seisin in law into a seisin in deed, such entry being intended to be made with that purpose and in that behalf (*Challis, Law of Real Property*, 2nd ed., p. 208). See SEISIN.

Actual Military Service.—The privilege of making a nuncupative will given to "any soldier being in actual military service" (Statute of Frauds, s. 22, and Wills Act, 1 Vict. c. 26, s. 11) is confined to those who are on an expedition, and does not extend to soldiers quartered in barracks at home or in the colonies (see Stroud, *in loc.*; and NUNCUPATIVE WILL).

Actual Possession.—As soon as a person is entitled to possession, and enters in the assertion of that possession, or any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and

each doing some act in the assertion of the right of possession, and if the question is which of the two is in *actual possession*, the person who has the title is in actual possession, and the other person is a trespasser; . . . the question which of the two really is in possession is determined by the fact of the possession following the title, that is, by the law which makes it follow the title (*per* Maule, J., in *Jones v. Chapman*, 1847, 2 Ex. Rep. p. 821; and see *Butcher v. Butcher*, 1827, 7 Barn. & Cress. 402; *Hay v. Moorhouse*, 1839, 6 Bing. N. C. 52; *Lowe v. Telford*, 1876, 1 App. Cas. 414; *Bristowe v. Cormican*, 1878, 3 App. Cas. 661; and Lightwood, *Possession of Land*). What amounts to "actual possession" for the purpose of a voting qualification was considered in the following cases: *Murray v. Thorinby*, 1846, 2 C. B. 217; *Webster v. Overseers of Ashton-under-Lyne* (*Orme's case*), 1872, L. R. 8 C. P. 281; *Webster v. Overseers of Ashton-under-Lyne* (*Hadfield's case*), 1873, L. R. 8 C. P. 306; *Lawcock v. Overseers of Broughton*, 1883, 12 Q. B. D. 369.

Actual Seisin.—See SEISIN.

Actual Seizure.—The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 1, provides that no writ of *fi. fa.* or other writs of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the *actual seizure* or attachment thereof by virtue of such writ; provided that such person had not, at the time when he acquired such title, notice that such writ or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the Sheriff, Under-Sheriff, or Coroner.

In this section "actual seizure" means no more than "seizure," inasmuch as no such fiction as constructive seizure was resorted to before the Act (*per* Bramwell, B., *Gladstone v. Padwick*, 1871, L. R. 6 Ex. 203).

Actual Total Loss.—See MARINE INSURANCE.

Actuary.—A person skilled in calculating the value of life-interests, annuities, and insurances; or an officer appointed to keep savings bank accounts, or the manager of an insurance company.

In English law, the first mention of the word occurs in the Friendly Societies Act, 1819 (*vide* 59 Geo. III. c. 128, s. 2), where we find "actuaries or persons skilled in calculation." Since the establishment in 1848 of the Institute of Actuaries (incorporated by Royal Charter on the 29th July, 1884), the term is employed with precision to designate a person skilled in calculating the value of life-interests, annuities, and insurances.

The profession of actuary is one requiring a wide and varied training. Examinations have to be passed, which are conducted in writing, or partly in writing and partly *vivâ voce*. Members of the Institute are divided into five classes—viz. (1) Fellows, (2) Associates, (3) Students, (4) Honorary members, and (5) Corresponding members. But persons who were members of the collective body established in the year 1848, and exercised the calling or profession of actuary, are fellows of the Institute as a matter of course. The examination to qualify students for admission to the class of associates

consists of two parts; the subjects of part i. including arithmetic, algebra, the first three books of Euclid, elements of the theory of compound interest, including annuities and the elements of book-keeping. The subjects of part ii. are, theory of compound interest, including annuities certain, the application of the theory of probabilities to life contingencies, the theory of life contingencies, including annuities and assurances on lives or survivorships, etc. If any associate should desire to become a fellow, he has a further examination to pass, the subjects of which include the elements of the law of real and personal property, the law relating to life assurance contracts, and to joint-stock companies and friendly societies, the principles of banking and finance, including a knowledge of the constitution and operations of the Bank of England, etc., etc. The principal duties of an actuary are the making of investigations and reporting on the financial condition of companies under the various Friendly Societies Acts, 1833-1889, inclusive.

[*Vide*, more particularly, the Friendly Societies Act, 1875, and the Life Assurance Companies Act, 1870; and, further, the Royal Charter of Incorporation, Bye-Laws, and Forms of Application for Admission.]

Ad damnum.—Under the old system of pleading, the declaration—now statement of claim (*q.v.*; and see ACTIONS IN THE HIGH COURT)—usually concluded “to the damage of the plaintiff of £ , etc.” In penal actions (*q.v.*) at the suit of a common informer, as the plaintiff’s right to the penalty did not accrue till the bringing of the action, and he could not have sustained any damage by a previous detention of the penalty, it was not proper to conclude *ad damnum* (1 Chit. P. C. 419).

Address for Service.—See SERVICE.

Ademption is complete or partial revocation of a benefit given by will, by a subsequent event in the testator’s lifetime, not being a revocation by a testamentary instrument, or in a manner authorised by the Wills Act.

1. A legacy given to a child by the will of a parent, or of a person who has undertaken the duties of a parent towards the child, may be wholly or partially adeemed by a subsequent gift to the child in the parent’s lifetime. Ademption in this sense is based upon the presumption against double portions; that is to say, that the Court will not impute to a parent the intention of providing for a child twice over. For the purposes of this doctrine a legacy given to a child without explanation is to be considered as a portion (*Ex parte Pye*, 1811, 18 Ves. 140; 11 R. R. 473).

The doctrine does not apply to a devise of real estate (*Davys v. Boucher*, 1839, 3 Y. & C. Ex. 397).

The circumstances or the admissible evidence may show that a subsequent gift was not intended to be a portion, or was not intended to be in substitution for the benefit given by will, but in the absence of such circumstances or evidence the doctrine applies (*Leighton v. Leighton*, 1874, L. R. 18 Eq. 458; *In re Lacon*; *Lacon v. Lacon* [1891], 2 Ch. 482).

If, therefore, a father leaves legacies to his children, and afterwards makes one of them a gift in his lifetime, the legacy is adeemed to the extent of the gift (*Pym v. Lockyer*, 1840, 5 Myl. & Cr. 29).

Where a residue is given to children, the share of one of the children

may in like manner be adeemed by a subsequent gift to the child (*Montefiore v. Guedalla*, 1859, 1 De G., F. & J. 93).

If a legacy is adeemed, the residuary legatee is necessarily benefited; but, in the case of gifts of residue, the presumption against double portions will not be applied against a child in favour of a stranger (*Meinertzen v. Walters*, 1872, L. R. 7 Ch. 670).

A variance between the provision made by the will and the gift will not prevent ademption. The question is whether both are to be considered as portions or not. Therefore a legacy given absolutely may be adeemed by a sum settled upon marriage, and conversely a settled legacy may be adeemed by an absolute gift (*Trimmer v. Bayne*, 1802, 7 Ves. 508, 6 R. R. 173; *Lord Durham v. Wharton*, 1836, 3 Cl. & Fin. 146; *Kirk v. Eddowes*, 1844, 3 Hare, 509; *Cooper v. Macdonald*, 1873, L. R. 16 Eq. 258; *Stevenson v. Masson*, 1873, L. R. 17 Eq. 78).

It will not prevent ademption that the legacy is in certain events given over. If the legacy is adeemed, the limitations over fail as well (*Twining v. Powell*, 1845, 2 Coll. 262; *Cooper v. Macdonald*, L. R. 1873, 16 Eq. 258).

The provision by will and the gift need not be the same in kind. For instance, a share of residue may be adeemed by the gift of a business (*In re Vickers*; *Vickers v. Vickers*, 1888, 37 Ch. D. 525).

A legacy once adeemed is not revived by a republication of the will by a codicil (*Powys v. Mansfield*, 1837, 3 Myl. & Cr. 376). See CODICIL; WILL.

The doctrine does not apply when the persons benefited by the will and the gift are entirely different; for instance, issue of a deceased child taking under the will and the child himself taking under the gift, or a daughter and her children taking under the will, and the daughter's husband having land under the gift (*Rose v. Rogers*, 1870, 39 L. J. Ch. 791; *Ravenscroft v. Jones*, 1863, 32 Beav. 669, 4 De G., J. & S. 224; *Cooper v. Macdonald*, 1873, L. R. 16 Eq. 258).

Small occasional presents are not to be considered portions for the purposes of the rule (*Ravenscroft v. Jones*, 1863, 32 Beav. 669, 4 De G., J. & S. 224; *Watson v. Watson*, 1864, 33 Beav. 574).

Upon a question of ademption, evidence is not admissible to explain the will, but all the circumstances attending the subsequent gift may be put in evidence, including declarations of the testator as to his intentions (*Kirk v. Eddowes*, 1844, 3 Hare, 509).

2. The doctrine of ademption also applies if a legacy to a stranger is expressed to be given from a feeling of moral obligation, and a gift is afterwards made to him from the same motive. The presumption is that the obligation was not intended to be discharged more than once (*In re Pollock*; *Pollock v. Worrall*, 1885, 28 Ch. D. 552).

3. A legacy expressed by the will to be given for a particular purpose is adeemed if the testator afterwards satisfies that purpose in his lifetime (*Debeze v. Mann*, 1787, 1 Cox, 346; 1 R. R. 57; *Pankhurst v. Howell*, 1870, L. R. 6 Ch. 136).

The same result follows if, though the legacy is not stated to be given for a particular purpose, it appears by presumption of law to have been so given, as, for instance, to satisfy a debt which is afterwards paid (*In re Fletcher*; *Gillengs v. Fletcher*, 1888, 38 Ch. D. 373).

4. The term ademption is also applied to the case of a legacy of a specific thing which no longer exists at the testator's death. The destruction of the thing destroys the legacy. See LEGACY.

For instance, destruction by the act of God (*q.v.*), a sale by the testator, or by lawful authority, or conversion into something different, will make the

specific gift inoperative (*Durrant v. Friend*, 1852, 5 De G. & Sm. 343; *Ashburner v. Macquire*, 1786, 2 Bro. C. C. 108; *Jones v. Green*, 1868, L. R. 5 Eq. 555; *Harrison v. Jackson*, 1877, 7 Ch. D. 339; *In re Freer*; *Freer v. Freer*, 1882, 22 Ch. D. 622; *In re Lane*; *Luard v. Lane*, 1880, 14 Ch. D. 856).

An unauthorised conversion will not cause ademption (*In re Larking*; *Larking v. Larking*, 1887, 37 Ch. D. 310). See CONVERSION.

In the same way, a gift of a debt is adeemed if paid to the testator during his life, whether the payment is voluntary or compulsory (*In re Bridle*, 1879, 4 C. P. D. 336).

A contract for sale of the thing bequeathed enforceable against the testator at his death has the same effect (*Watts v. Watts*, 1873, L. R. 17 Eq. 217; *Crowe v. Newton*, 1891, 28 L. R. Ir. 519).

But there is no ademption if the contract is afterwards rescinded, owing to a defect in the testator's title (*In re Thomas*; *Thomas v. Howell*, 1886, 34 Ch. D. 166).

It has even been held that an option to purchase certain property conferred by the testator after the date of his will, but not exercised till after his death, will destroy a specific gift of the property (*Weeding v. Weeding*, 1861, 1 John. & H. 424; see *Lawes v. Bennett*, 1785, 1 Cox, 167; 1 R. R. 10; *Townley v. Bedwell*, 1808, 14 Ves. 590; 9 R. R. 352; *In re Isaacs*; *Isaacs v. Reginald* [1894], 3 Ch. 596).

But this doctrine has been held inapplicable to a gift of specific property, subject to an option of purchase existing at the date of the will (*Drant v. Vause*, 1842, 1 Y. & C. C. 580; *Emuss v. Smith*, 1848, 2 De G. & S. 722; *In re Pyle*; *Pyle v. Pyle* [1895], 1 Ch. 724).

A change which leaves the thing substantially the same as before will not adeem the gift. The question is one of fact in each case, whether the thing remains in effect the same or not. For instance, conversion of shares into stock does not, but conversion of debentures into debenture stock does, make such a change as to cause ademption (*Oakes v. Oakes*, 1852, 9 Hare, 666; *In re Lane*; *Luard v. Lane*, 1880, 14 Ch. D. 856).

An appointment of specific securities under a power is not adeemed by a subsequent change of investment (*In re Johnstone's Settlement*, 1880, 14 Ch. D. 162; *Willett v. Finlay*, 1891, 29 L. R. Ir. 156, 497).

And though there is some conflict of authority, the better opinion appears to be that a devise of an estate, under a power in a settlement, is not adeemed by a subsequent sale of the estate under the powers conferred by the settlement (*Cooper v. Martin*, 1867, L. R. 3 Ch. 47; *In re Lowman*; *Devenish v. Foster* [1895], 2 Ch. 348; see, however, *Gale v. Gale*, 1856, 21 Beav. 349; *Blake v. Blake*, 1880, 15 Ch. D. 481).

If the gift is so expressed as to show the testator's intention that the legatee is to take the benefit, whatever may be the condition or state of investment at his death of the thing given, no case of ademption will arise, and the gift will take effect if the property can be traced (*Moore v. Moore*, 1859, 29 Beav. 496; *Morgan v. Thomas*, 1877, 6 Ch. D. 176).

In the case of gifts of furniture in a house, a permanent removal will, but a temporary removal will not, deprive the legatee of the right to the furniture (*Blagrove v. Coore*, 1859, 27 Beav. 138; *In re Johnston*; *Cockerell v. Earl of Essex*, 1884, 26 Ch. D. 538).

[See Williams on *Executors*, part iii. bk. iii. ch. iii.; White and Tudor, 6th ed., vol. ii. pp. 280-382; Theobald on *Wills*, pp. 127, 631.]

Adhering to the Queen's Enemies.—See TREASON.

Ad Idem.—A phrase descriptive of an essential element in an agreement or contract; an agreement being the outcome of consenting minds having a distinct intention in common. If the parties are not *ad idem* there is no contract. See CONTRACT.

Adjacent Support.—Adjacent support is that support which land or buildings derive from the adjacent land or buildings belonging to a different owner. A right to land in its natural state is one of the natural rights given by law to every landowner, whereby peaceable enjoyment is secured to him, and he is guaranteed against damage from his neighbour's acts in his own ground. A similar right for buildings may be acquired by long enjoyment or grant, express or implied, from both adjacent land and adjoining buildings (*Angus v. Dalton*, 1881, 6 App. Cas. 740). Though this right is said to be a right to support from adjacent land, and thus the impression is apt to be conveyed that the adjoining owner only is subject to the corresponding obligation to afford support, it often happens that support is needed far beyond the immediate neighbour's land. In such case the right and the obligation extend beyond that land to the more distant land of other persons (*Mayor of Birmingham v. Allen*, 1877, 6 Ch. D. 284). The same principle would probably apply to buildings deriving support, not only from the immediate neighbour, but from other buildings more distant in a row. In *Solomon v. The Vintners' Company*, 1859, 4 H. & N. 585, the house which was pulled down, and the house which fell in consequence, were not contiguous, but were separated by an intermediate house in the same row.

If a landowner, entitled to adjacent support by natural right, builds, and so places an artificial weight on his land, his natural right is not lost; and if his neighbour excavates in his own ground, in such a way that the dominant land would have sunk had no artificial weight been imposed, the dominant owner would still have his remedy at law, for the damage both to the land and also to the building (*Brown v. Robins*, 1859, 4 H. & N. 186; *Stroyan v. Knowles*, 1861, 6 H. & N. 454). See ADJOINING OWNERS; ADJOINING TENEMENTS.

Adjective Law.—An expression used in jurisprudence to describe the department of law which is concerned with practice and procedure. It is contrasted with "substantive" law, the name applied to the law which the Courts are established to administer. It denotes the rules according to which the substantive law is administered, and the modes of procedure by which legal rights are enforced. Prof. Holland (*Jurisprudence*, c. xv.) says: "Adjective law, though it concerns primarily the rights and acts of private litigants, touches closely on topics, such as the organisation of Courts, and the duties of judges and sheriffs, which belong to public law." It comprises the rules for—

1. Selecting the jurisdiction which has cognisance of the matter in question.
2. Ascertaining the Court which is appropriate for the decision of the matter.
3. Setting in motion the machinery of the Court, so as to procure its decision.
4. Setting in motion the physical force by which the judgment of the Court is in the last resort to be rendered effectual.

In common with private law, public and international law is divisible into substantive and adjective.

The terms "substantive" and "adjective," originally employed by Bentham (*Works*, ii. 6), have been generally adopted by English jurists, although their use was severely criticised by Austin (*Jurisprudence*, ii. 788).

• **Adjoining Owners.**—When lands have been acquired for the purpose of an undertaking, *e.g.* a railway, under the provisions of the Lands Clauses Act, 1845, or a special Act, "adjoining owners" are given certain rights with regard to land which is not required for the purposes of the undertaking, called "superfluous lands," a term that has received judicial interpretation in a number of cases (see particularly *Great Western Railway v. May*, 1874, L. R. 7 H. L. 283; *Hooper v. Bourne*, 1877, 3 Q. B. D. 258; *Betts v. Great Eastern Railway*, 1879, 49 L. J. Ex. 197; *Hobbs v. Midland Railway*, 1882, 51 L. J. Ch. 320). The promoters of an undertaking are required to sell and dispose of such superfluous lands within the time prescribed by the special Act, or, if no period has been prescribed, then within ten years after the expiration of the time limited by the special Act for the completion of the works, giving, however (unless such lands are situate within a town, or are lands built upon or used for building purposes), a right of pre-emption, first "to the person then entitled to the lands (if any) from which the same were originally severed, or if such person refuse to purchase the same, or cannot, after diligent inquiry be found, then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption, such offer shall be made to such persons in succession, one after another, in such order as the promoters of the undertaking shall think fit" (Lands Clauses Act, 1845, s. 128.) The right of pre-emption thus given must be exercised, if at all, within six weeks after the offer of sale has been made to any person entitled (s. 129). Superfluous lands, not so disposed of at the expiration of the period prescribed, "thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same" (s. 127). It is to be observed that a person may not be an "adjoining owner," within s. 127, although he may be entitled to a right of pre-emption under s. 128 (*Hooper v. Bourne*, *ubi supra*; *Hobbs v. Midland Railway*, *ubi supra*).

A company may, by its special Act, be relieved from the obligation of disposing of its superfluous lands, and in such a case the rights of adjoining owners under these sections do not arise (see *Tomlin v. Budd*, 1874, L. R. 18 Eq. 368).

It seems not quite clear whether s. 127 applies where an undertaking has been abandoned (see *Astley v. Manchester, Sheffield, and Lincolnshire Railway*, 1858, 2 De G. & J. 453, 463; and *Smith v. Smith*, 1868, L. R. 3 Ex. 282); but even where there has been an abandonment, the rights of an adjoining owner do not arise until the expiration of the prescribed period (*Astley v. Manchester, Sheffield, and Lincolnshire Railway*, *ubi supra*), unless, indeed, the company have sold the land as superfluous land (*Carington v. Wycombe Railway*, 1868, L. R. 3 Ch. 377), or by some act of theirs have shown that they are about to dispose of it as superfluous land (*Astley v. Manchester, Sheffield, and Lincolnshire Railway*, *ubi supra*; *London and South-Western Railway v. Blackmore*, 1870, 39 L. J. Ch. 713). It is to be observed,

however, that by the word "dispose" the Act contemplates the transfer of the land to some other person, not the application of it by the company to a new purpose (*Asley v. Manchester, Sheffield, and Lincolnshire Railway, ubi supra*); see also *Dunhill v. North-Eastern Railway* [1896], 1 Ch. 121, where it was decided that no right of pre-emption arose where, within the prescribed period, lands which had been acquired by one railway company were compulsorily purchased by another company for the purpose of their undertaking.

In *Hooper v. Bourne, ubi supra*, it was decided that where, adjoining the superfluous lands, there was a road, the soil of which was vested in the lord of the manor, but upon which certain persons were entitled to grass and herbage, the lord of the manor was the adjoining owner under s. 127, and not the persons entitled to such grass and herbage.

Mines and minerals expressly granted to a railway company with lands which have become superfluous lands, under s. 127 do not pass to the adjoining owner with the land (*Hooper v. Bourne, ubi supra*). Lessees for years may be adjoining owners under s. 128 (*Coventry v. London, Brighton, and South Coast Railway*, 1867, L. R. 5 Eq. 104), where it was also decided that lands separated from the superfluous lands by a private road, of which the lessees had the exclusive right of user during their tenancies, were "immediately adjoining lands," within the same section.

A person may be an "adjoining owner," within s. 128, although he purchased the adjoining lands from the company against which he claims a right of pre-emption; and the existence of a boundary wall on land, the joint property of such person and the company, does not prevent such person from being considered an "adjoining owner" (*London and South-Western Railway v. Blackmore, ubi supra*).

Where there are several adjoining properties in contact with the superfluous land, such superfluous land is to be divided among the adjoining owners in proportion to the frontage of each, meaning by frontage what would be the length of the line of contact of each property, if such line were made straight from the point of intersection of the boundaries on one side to the point of intersection of the boundaries on the other side (*Moody v. Corbett*, 1866, L. R. 1 Q. B. 510, 518; but see also *Smith v. Smith, ubi supra*). As all adjoining owners have equal rights of pre-emption, if only one is plaintiff, an inquiry will be directed to ascertain whether any of the other adjoining owners are desirous of purchasing (*London and South-Western Railway v. Blackmore, ubi supra*).

The term "adjoining owner" occurs also in the London Building Act, 1894. By s. 5, subs. 32, of that statute, an "adjoining owner" is defined as "the owner or one of the owners . . . of land, buildings, storeys, or rooms adjoining those of the building owner," and on the corresponding section (82) of the Metropolis Building Act, 1855 (which was repealed by the Act of 1894), it was decided in *Fillingham v. Wood* [1891], 1 Ch. 51, that a tenant in possession of part of a house for a greater interest than as tenant from year to year, was an "adjoining owner."

Owners of premises "fronting, adjoining, or abutting" on streets are chargeable, under s. 150 of the Public Health Act, 1875, with the expense of sewerage, paving, etc., the streets referred to in that section. In *Lightbound v. Higher Bevington Local Board*, 1885, 16 Q. B. D. 577, 584, Bowen, L. J., dealt with the meaning of "adjoining." He said: "In considering whether houses adjoin, which are placed in close proximity to the part of the street which is to be paved, it is a most important fact, and in many cases a dominant fact, to see whether there is a substantial access and advantage

which the houses enjoy from that portion of the street which is to be paved, and a substantial access and advantage of that kind, coupled with close proximity, may bring the case within the word 'adjoin,' though there is no actual touch."

See ADJOINING TENEMENTS.

• **Adjoining Tenements.**—At common law, every proprietor of land is entitled to such support to the soil of his land from that of the adjoining owner as is necessary to sustain his own land in its natural unencumbered state, *i.e.* unweighted by buildings, and an action is maintainable in respect of a subsidence caused by the withdrawal of such support. (See cases collected in Smith's L. C., 10th ed., vol. i. pp. 270–2.) There is no common-law right to support for buildings, but such a right may be acquired by grant, express or implied, or by prescription. (For the mode of acquiring such and similar rights, see EASEMENTS.)

Where branches of a tree growing upon the land of one owner overhang that of another, the owner of the land encroached upon is entitled, without notice, if he does not trespass on the adjoining land, to cut the branches so far as they overhang, although they have done so for more than twenty years (*Lemmon v. Webb* [1895], App. Cas. 1).

The occupier of one tenement of land is under no duty towards the occupier of the adjoining tenement to periodically cut the thistles growing on his land so as to prevent them from seeding, and he is not liable for any damage caused by seeds blown on to the adjoining land (*Giles v. Walker*, 1890, 24 Q. B. D. 656). A person is not entitled to recover for injury caused to his animals through eating the branches growing on his neighbour's land, and not projecting over the same (*Ponting v. Noakes* [1894], 2 Q. B. 281). (For illustrations of the maxim, *Sic utere tuo ut alienum non laedas*, see NEGLIGENCE and NUISANCE.)

In Viner's *Abridgment*, s.v. "Trespass" L. a., it is stated: "If trees grow in my hedge, hanging over another man's land, and the fruit of them falls into the other's land, I may justify my entry to gather up the fruit, if I make no longer stay there than is convenient, nor break his hedge"; and the same is laid down with regard to trees blown over by the wind (*Ibid.* H. a., 2. But a previous request to deliver the property might probably be necessary (see *Anthony v. Haney*, 1832, 8 Bing. 186); and if the owner (or occupier) of the adjoining tenement refused, after request, to deliver up the property or to make any answer to the owner's demand, "a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit" (*per* Tindal, C. J., in *Anthony v. Haney*, *ubi supra* at p. 193). The rule stated above with regard to the right of entry upon an adjoining tenement to retake fruit or trees which have accidentally fallen there, appears not to hold where trees have fallen through cutting (*Vin. Abr.*, "Trespass," H. a., 2; *Anthony v. Haney*, *ubi supra*). See TRESPASS.

Where the boundary between two adjoining tenements is marked by a hedge and ditch, the presumption is that the latter belongs to the owner of the former, but it appears doubtful whether the presumption holds where the ditch is not an artificial but a natural watercourse (*Marshall v. Taylor* [1895], 1 Ch. 641).

Where adjoining tenements are divided by a party wall, the rights of each owner with respect to such wall depend upon the character of their ownership of, or interest in it, for a party wall may mean—(1) A wall of

which the two adjoining owners are tenants in common; or (2) A wall divided longitudinally into two strips, one strip belonging to each of the adjoining owners; or (3) A wall which belongs to one of the adjoining owners, but is subject to an easement or right in favour of the other to have it maintained as a dividing wall between the two tenements; or (4) A wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favour of the owner of the other moiety (*Watson v. Gray*, 1880, 14 Ch. D. 192). In the absence of evidence as to the ownership of a party wall, a jury is entitled to find that it belongs to the adjoining proprietors as tenants in common (*Standard Bank of British South Africa v. Stokes*, 1878, 47 L. J. Ch. 554). Where a party wall is owned by two adjoining proprietors as tenants-in common, and one excludes the other from the use of such wall by placing an obstruction upon it, the only remedy of the excluded tenant is to remove the obstruction (*Watson v. Gray*, *ubi supra*). In *Cubitt v. Porter*, 1828, 8 Barn. & Cress. 257, it was held that, where one of the two tenants in common of a wall pulled down the wall, with the intention of rebuilding the same, and a new wall was built of a greater height than the old one, no trespass had been committed; but if there has been an actual ouster of one of the owners from the common property, an action is maintainable by him in respect thereof (*Stedman v. Smith*, 1857, 8 El. & Bl. 1). In *Mayfair Property Co. v. Johnston* [1894], 1 Ch. 508, where a tenant in common of a garden wall, in the course of building operations, pulled down the wall and rebuilt the same on a concrete foundation which encroached upon the land of the other tenant in common, who was a reversioner, the Court ordered that the wall should be divided longitudinally between the co-tenants, and refused a mandatory injunction to compel the wrongdoer to remove the encroaching foundation, but granted damages to the reversioner in respect of the trespass, on the ground that it was of a permanent nature. If the wall is not common property, but one-half of it belongs exclusively to the one proprietor and the other half exclusively to the adjoining proprietor, one owner may pull down his half of the wall, although the remaining half might not stand without support (*per* Holroyd, J., in *Wiltshire v. Sidford*, 1827, 1 Man. & R. K. B., 408), unless an easement of support has been acquired. If the wall is owned in severalty, with cross-easements in favour of each proprietor, and one of the owners pulls down his portion, he will be liable for disturbing the rights of the other owner.

The rights of owners of adjoining tenements in the metropolis, respecting the erection of walls, etc., on the line of junction of the properties, are now governed by part viii. (ss. 87-101) of the London Building Act, 1894, 57 & 58 Vict. c. cxxiii., to which reference should be made. See also ADJOINING OWNERS; EASEMENT; PARTY WALL; SUPPORT.

Adjourned Sessions.—Since the Statute 11 Geo. iv. & 1 Will. iv. c. 70, s. 35, only provides for meetings of the General Quarter Sessions of the Peace (see QUARTER SESSIONS) four times in each year, it became the practice to hold additional sessions in the intervals, and to treat such additional sessions as adjournments of the quarterly sessions last preceding. And as to the county of London, in particular, it is provided by 51 & 52 Vict. c. 41, s. 42, subsec. 6, that adjournments of sessions can be held there with all the jurisdiction of the general quarter sessions. The general sessions and the adjourned sessions in such cases, for whatever number of days they continue, are deemed in law to be one sessions,

and every proceeding thereat is referred back to the first day of the general quarter sessions (*R. v. Surrey (Justices)*, 1813, 1 M. & S. 479; *Rawnsley v. Hutchinson*, 1871, L. R. 6 Q. B. 305). An Act (1 & 2 Vict. c. 4) was even passed to remove doubts as to the legality of summoning juries for the trial of prisoners at adjourned quarter sessions. Justices may accordingly postpone any matter to adjourned sessions, and these need not be the sessions next succeeding those from which the adjournment takes place (*R. v. Westmoreland (Justices)*, 1868, L. R. 3 Q. B. 457); and they may at any time, before the actual close of the sessions (*St. Andrew's, Holborn v. St. Clement Danes*, 1704, 2 Salk. 494, *per* Holt, C. J.), vary or revise their orders or sentences; but not after the sessions are closed (*Inter Inhabitants of Cockfield and Boxstead*, 1696, 2 Salk. 477). Even in the matter of costs, when costs are allowed by an order of quarter sessions, and consent to a taxation out of sessions is not given, no subsequent Court of quarter sessions has jurisdiction to order a taxation (*Midland Railway Company v. Guardians of the Poor of the Edmonton Union*, L. R. [1895], 1 Q. B. 357).

Frequently sessions are adjourned as a matter of course. Thus, if quarter sessions of a county occur while the judges of assize are sitting trying prisoners of the county, the usual course is for the justices not to proceed with their criminal trials, but to dispose of all their other business, and then adjourn to a future day (*Anon.* 9 Car. & P. 790). Now, by 57 & 58 Vict. c. 6, s. 1, the justices have power under such circumstances to alter in advance the time for holding the next quarter sessions, provided the date fixed is not earlier than fourteen days before or later than fourteen days after the week in which they would otherwise be held. Again, should the justices, in deciding a matter, be found to be equally divided, an adjournment must be made, for the chairman has no casting vote; and even when there is merely a doubt in the minds of the magistrates, the matter may be adjourned for further consideration. And the justices may during the sessions *re-hear* a case after decision pronounced, on the ground that the parties had been taken by surprise by the evidence, or that, subsequently to the hearing, fresh material evidence had been discovered which might have affected the judgment. Care must always be taken, however, that matters are disposed of not later than the next ensuing original general or quarter sessions (*Lingfield v. Battle*, 1702, 2 Salk. 605). The instant the sessions are ended, the magistrates are *functi officio*, and matters cannot be re-opened except by appeal, if the statute allows it, or by certiorari, or by a case under the Summary Jurisdiction Act, 1879, or 20 & 21 Vict. c. 43, if the judgment is alleged to be erroneous in point of law. See also article on ADJOURNMENT.

Adjournments of sessions must, in order to be valid, be made by or in presence of two or more justices; that is, as large a number as is required to hold sessions (*R. v. Westrington*, 2 Bott's P. L. 733); and at adjourned sessions the business is conducted by two or more justices, just as at original sessions.

Besides adjournments of general sessions, the so-called brewster adjourned sessions must be noticed. Besides the special sessions, known as the general annual licensing sessions, which are held between 20th August and 14th September in every year (except in London, Middlesex, and Surrey, where they are held the first ten days in March), by 9 Geo. IV. c. 61, s. 3, there is also to be held an adjournment thereof, which is in every respect equivalent to a second general annual licensing meeting. These adjourned sessions must be held not later than the end of September (or, in London, Middlesex, and Surrey, not later than the end of March); and such an

interval should elapse between the principal sessions and the adjourned sessions as will enable applicants who may have inadvertently omitted to give the proper notices, etc., to make good their omissions, without waiting until the next brewster sessions. That interval will be one of at least five days. Due notice is to be given of the adjourned sessions (9 Geo. IV. c. 61, s. 5); but such notice need not be given to applicants for renewal (37 & 38 Vict. c. 49, s. 26). If any objection to the granting of a renewal of a licence has been raised at the principal sessions, either by the justices, or by some third person, that matter also will be referred to an adjourned meeting, and then the personal attendance of the licenceholder may be required. But personal attendance is only, as a rule, required for some special cause personal to the licenceholder. Whenever the justices have heard and decided a case at the principal brewster sessions, however, it ceases to be competent to claim a re-hearing at the adjourned sessions (*Ex parte Rushworth*, 1869, 23 L. T. 120).

Again, at the special petty sessions held yearly for the purpose of revising the list of men qualified and liable to serve on juries, parties who consider themselves unqualified from any cause, may apply to have their names deleted; and the justices, on their part, may, of their own knowledge, insert names that appear to have been omitted, or otherwise rectify the list; but in all cases, before so rectifying the list, the justices must issue notices requiring the parties interested to show cause, and for that purpose must appoint an adjournment of the aforesaid petty sessions, to be held within four days of the principal sessions (6 Geo IV. c. 50, s. 10; 25 & 26 Vict. c. 107, s. 5). And further, the principal sessions so held may be adjourned to a day within seven days of the same where default has occurred in the production of a jury list, the clerk of the peace in the meantime giving the defaulting churchwardens or overseers notice to make good their omission at such adjourned sessions.

Adjourned Summons.—As to the power to adjourn generally, see R. S. C., Order 52, r. 7. In the Chancery Division, a chief clerk may adjourn a summons to the judge (Order 55, rr. 15 & 69), and in all Divisions of the High Court a judge in chambers may adjourn a summons into Court, and the Court may adjourn a summons into chambers (Order 54, r. 9). An adjournment from the chief clerk to the judge in the Chancery Division is not an appeal. A party has a right to be heard by the judge personally, and if the judge decides against him, he ought not to be ordered to pay costs as on an unsuccessful appeal (*In re Watts*, 1882, 22 Ch. D. 5; 52 L. J. Ch. 209; 48 L. T. 167; 31 W. R. 262). An adjournment into Court is not an appeal. It is merely a continuation of the hearing in chambers, and the same evidence is generally used, but further evidence may usually be filed and used by leave of the judge or chief clerk (*In re Chifferiel*, 1888, 36 W. R. 806).

The costs in chambers are reserved and dealt with on the adjournment (*Dicken v. Hamer*, 1860, 2 L. T. 276). In a case where no costs would be given if a summons were heard by the judge in chambers, if the summons is adjourned into Court, the unsuccessful party may be ordered to pay the costs occasioned by the adjournment (*Henry Holden's Case*, 1869, L. R. 8 Eq. 444; 21 L. T. 197; 17 W. R. 875). If a party takes a new point, on the adjournment into Court, which he might have taken in chambers, he may be deprived of the costs of the adjournment, though the

result is in his favour (*In re Davies*, 1888, 38 Ch. D. 210). It is entirely in the discretion of the judge to hear matters in chambers, or to adjourn them into Court (*In re Agriculturist Cattle Assurance Company*, 1863, 3 De G., F. & J. 194; 11 W. R. 330). It is usual to adjourn summonses into Court for argument or judgment, in cases where an appeal is desired (*Holloway v. Cheston*, 1881, 19 Ch. D. 516).

[See Daniel's *Chancery Practice*, 6th ed., vol. ii. pp. 971–3; *The Annual Practice*, notes to rules cited above.]

Adjournment properly signifies the act of continuing the session, or postponing the deliberations of an assembly or meeting, to another time or place. Usually an adjournment is *ad diem*, to a day named, but it may also be indefinite, the Latin formula then being *Eat sine die*.—Sometimes the term is employed to indicate the interval between a meeting, and its continuation on a subsequent day.

In *Parliamentary Procedure*, two kinds of adjournment are distinguished—adjournment of the House and adjournment of the debate. The former is the continuation of the session from one day to another, though occasionally, as at Christmas or Easter, the rising may be for a fortnight or even longer period. Either House adjourns independently of the other, and during an adjournment all unfinished business remains in the same state as when the House rose. An adjournment, therefore, is quite different from a *prorogation* (*q.v.*), which is an act of the sovereign, and closes the session of both Houses, including all business under consideration at the time; and from a *dissolution* (*q.v.*), which occurs either on the sovereign's will or by lapse of time, and means the civil death of Parliament. The Lords frequently adjourn “during pleasure,” when the sitting may be resumed at any hour of the day on which such adjournment takes place, simply by the acting Lord Chancellor, in his discretion, taking his seat on the woolsack, in presence of at least two others peers. Five o'clock P.M. is fixed by usage as the hour for resuming after such adjournment, and should the House not then resume, it will stand adjourned to the usual hour on the following day. In the Commons, on the other hand, adjournment is effected by the Speaker, either when a quorum is not present, or upon a resolution carried by the House. If less than forty members be present at the hour of meeting, or if it appears, on notice being taken, or on a division of the House, or after a report from the chairman of a committee of the whole House, that less than forty members are present, then the speaker adjourns the House until next day of meeting, without any question being first put. Otherwise, any member in possession of the House who has not spoken to the main question, or moved the adjournment of the debate, may move “that this House do now adjourn,” or, in the case of a committee of the whole House, that the chairman do now leave the chair; whereupon, if this motion is seconded and affirmed, the original matter under consideration is superseded, and the House immediately adjourns, the original matter disappearing from the order book, until further directions by the House. The Commons always adjourn to a time specified. As to the adjournments of the debate; if it is desired to postpone a debate in progress, any member in possession of the House, who has not spoken to the main question, may move that the debate be now adjourned, and this motion, if seconded and affirmed, will have the desired effect. In committee it is not competent to move the adjournment of the debate, the analogous motion being, that the chairman do report progress, and ask leave to sit again. On an adjourned

debate other than one in committee of the whole House being resumed, the member who moved the adjournment is in possession of the House, and has precedence if he rises at the proper time (see May, *The Law, Privileges, Proceedings, and Usage of Parliament*).

At *public meetings*, anyone who has not spoken on the subject before the meeting, may move, without notice at any time, that this meeting do now adjourn, when such motion will take precedence of questions under discussion, and, unless withdrawn, be put to the vote without debate. If seconded and carried, it should be followed by another motion, naming a time and place for the adjourned meeting, unless the meeting is one of a series, when the adjournment will be deemed to be to the next of the series. No person should move or second more than one motion for adjournment during the same debate. At vestry meetings, the chairman has power to adjourn whenever necessary; and he must not exercise his power unreasonably; or he can have a poll taken, that is, have the votes of members for and against the adjournment enumerated, without regard to the number present.

With regard to *general meetings of companies* limited under the Companies Acts, it is a usual clause in articles of association, that the chairman of such a meeting shall have power, with the consent of the meeting, to adjourn the same from time to time, and from place to place, but that no business shall be transacted at any adjourned meeting, other than the business left unfinished at the meeting from which the adjournment took place. A clause in these terms is included in sched. i. table A, of the Companies Act, 1862, and the rule, therefore, prevails in the absence of express modification in the articles of association. The chairman, however, has no right to stop a meeting at his own will and pleasure, and if he improperly purports to do so and leaves the chair, the meeting would be justified in electing another chairman, and proceeding with its business (*Chitty, J., in The National Dwellings Society v. Sykes* [1894], 3 Ch. 159). If a meeting is adjourned to a subsequent day named, no notice of the adjourned meeting need be given; but an adjournment may be indefinite, in which case the day for the adjourned meeting must be indicated by subsequent notice (*R. v. Mayor, etc., of London*, 1829, 9 Barn. & Cress. 1). Companies' articles of association ought expressly to state whether, at meetings, questions as to adjournments are to be decided merely by the shareholders present, or by a poll which shall include proxies of absent shareholders. It has been doubted whether, apart from such a clause, proxies can be reckoned (*Macdougall v. Gardiner*, 1875, 1 Ch. D. 13).

In the *High Court of Justice*, trials may be adjourned by a judge, if deemed expedient for the interests of justice, for such time and to such place, and upon such terms, if any, as he shall think fit (Order 36, r. 34). Application so to postpone a trial can be made at any time after notice of the trial, and not merely when the case is in the paper. It should, in the former case, be made by summons before a master or district registrar, and should state good reason for the adjournment—as, that a compromise is in progress, or that the pleadings require amendment. An order is in the judge's discretion, and the exercise of this discretion will not be reviewed by the Court of Appeal. The costs will be paid by the applicant, and if the case is in the paper when the application is made, will include, besides the fixed sum of £10 for costs of the day, all costs due to the action having been in the paper (*Lydall v. Martinson*, 1877, 5 Ch. D. 780). In the same way, any motion or application may be adjourned upon such terms as the judges shall think fit (Order 52, r. 7); and applications to chambers,

by summons or otherwise, may also be adjourned from chambers into Court or from Court into chambers (Order 54, r. 9). An adjournment in the latter case is merely a continuation of the hearing in chambers, and costs are reserved without express directions (*Dicken v. Hamer*, 1860, 2 L. T. N. S. 276). Evidence not tendered in chambers will not as a rule be accepted at the adjourned hearing in Court (*In re Marsden*, 1889, 40 Ch. D. 479), and further affidavits ought always to be filed under direction of the judge, or chief clerk in chambers (see further, Order 55, rr. 29 and 36). As to applications to postpone appeals, a notice issued in 1887 states, that upon production to the registrar of a consent by the solicitors of all parties, four clear days before the appeal is likely to be in the paper, with reasons, the case will be mentioned by the cause clerk to the Court, when, if the reason is sufficient, the appeal will be marked not to appear until the day agreed.

In *bankruptcy*, similar rules as to adjournment prevail. Thus the Court has a general discretion to adjourn any motion or application for such times and on such terms as it shall think fit. And a petition part heard may be adjourned, the party desiring the adjournment paying the full costs of the day (*Anon.*, 1810, 1 Rose, 24; *Ex parte Kent*, 1836, 2 Deat. 287; and see B. A., 1883, s. 105, subs. 2, and B. R., 1886, No. 32). If a petition is *lous* adjourned, fresh affidavits cannot as a rule be filed in the interval (*Ex parte Fry*, *In re Stinchcombe*, 1832, 1 Deac. & Ch. 488). It is more usual, therefore, to allow petitions to stand over. Thus, if the affidavits in support have been filed very late, or are very voluminous, or if the respondent's affidavits have been filed very late, the Court may, upon motion by the other party, order the petition to stand over, that replies may be lodged, the party at fault paying costs. The affidavits must in that event seem to be material. Otherwise, without leave to file further affidavits, neither party can vary the case by fresh evidence (*Ex parte Rawlinson*, 1825, 3 L. J. Ch. 54; see B. R., 1886, Nos. 162, 169). Further, a judge or registrar has, under the rules, power to adjourn matters from chambers to Court, or from Court to chambers, and a judge can adjourn matters before the registrar to himself. At every meeting of creditors, too, a quorum must be present, otherwise the chairman must adjourn it to the same day and hour in the succeeding week, or as he may appoint, though not less than seven days, or more than twenty-one days from the meeting adjourned (B. A. 1883, sched. i. par. 24), and every duly constituted meeting may be adjourned by the chairman with its consent, as may be convenient (*Id. ibid.* par. 22). Half an hour is the time allowed for a quorum to assemble in such cases. The adjourned meeting will be at the same place as the original meeting, unless another place is specified in the resolution for adjournment (B. R., 1886, No. 256; Forms 91, 92). Again, in the case of petitions for winding-up companies, if the Court considers an immediate order unnecessary, an immediate order will be refused, and the company allowed time to *ply*, under conditions (*In re St. Thomas' Dock Co.*, 1876, 2 Ch. D. 116). Creditors' claims in a winding-up may also be adjourned into Court, and if so, with costs out of the estate, that means the cost of adjournment, the costs in chambers being added to the debt (*Henry Holden's case*, 1869, L. R. 8 Eq. 444).

In the *Mayor's Court* and *County Courts*, adjournments are also competent for such times and under such conditions, as to costs and otherwise, as the Court appoints (see Common Law Procedure Act, 1854, s. 19; 51 & 52 Vict. c. 43, s. 106; Form, 143; and County Court Rules, 1889, Order 12, r. 15). No hearing fee is payable on such adjournment, if the order is made before the case is called on for trial, but no subsequent postponement will be granted until the hearing fee is paid (Order*12, r. 12). An order

must not be *ex parte*, but on notice (under Order 12, r. 11 (A)), or by notice for directions (under Order 15, rr. 1, 4), and no adjournment by the parties is operative (*Morgan v. Rees*, 1881, 6 Q. B. D. 508). So, too, an examiner of Court can adjourn an examination as he thinks proper, even without the consent of the witnesses.

Lastly, in *criminal trials*, when a case is not concluded on one day, the practice is to adjourn it until next morning, the jury meanwhile being kept together under surveillance, so that they cannot hold communication with third parties. In the case of misdemeanours, however, jurymen are generally allowed to go home for the night, on undertaking not to converse with anyone about the trial. It is also usual to adjourn when material witnesses are not forward; and should a trial have been partly heard, the jury will be locked up in the interval (*R. v. Foster*, 1845, 3 Car. & Kir. 201). The Court frequently adjourns, too, while the jury are considering their verdict, reassembling to receive the same. Again, at sessions, the justices may, if they think fit, in the presence of the parties or their representatives, direct an adjournment, either allowing the defendant in the meantime to go at large, or committing him to safe custody, or discharging him upon recognisances, with or without sureties (11 & 12 Vict. c. 43, s. 16; and 42 & 43 Vict. c. 49, s. 20 (11)). They may also adjourn a case, and remand a person charged with an indictable offence, cognisable by a Court of summary jurisdiction, to the next petty sessional Court (34 & 35 Vict. c. 112, s. 17; and 42 & 43 Vict. c. 49, s. 24). If the defendant is to be detained in custody, the adjournment must not be for an unreasonable time; and where a statute requires a conviction within a limited period, adjournments will be granted with caution. Justices appear, however, to have no power to continue recognisances, and fresh recognisances will be entered into on each adjournment. In the interval, a justice may bring the defendant again before him, and he may at any time allow a person accused to go at large upon recognisances, with or without sureties (11 & 12 Vict. c. 42, s. 21). If either or both parties fail to appear at the adjourned hearing, the Court may proceed as if the parties were present, and dismiss the complaint with or without costs (11 & 12 Vict. c. 43, s. 16), or adjourn it for a reasonable time (*Id. ibid.* s. 13). The same justices need not sit at the adjourned sessions (*q.v.*) as were originally present, but if the Court is differently constituted, the evidence previously given should be repeated on oath. Remands under 11 & 12 Vict. c. 43, s. 21, are in a different position. These take place before trial, with a view to fuller inquiry, and very little evidence will justify detention. The justice may either verbally desire the defendant to be kept in custody for a period not exceeding three clear days, or, by warrant, remand him to some place of security for a period not exceeding eight clear days. In the Metropolitan Police Courts, remands are directed at latest to the day following the corresponding day of the ensuing week, but elsewhere eight clear days are allowed, so that prisoners may be detained as long as ten days. As to non-appearance of a defendant, "justices ought to be very cautious how they proceed in the absence of a defendant, unless they have strong ground for believing that the summons has reached him, and that he is wilfully disobeying it" (Cockburn, C. J., in *R. v. Smith*, 1875, L. R. 10 Q. B. 608). If not satisfied, they should always adjourn the hearing, and have a fresh summons issued, or otherwise inform defendant of the postponement. If, in point of fact, the summons has not been actually served, a *certiorari* (*q.v.*) will lie to quash the order (*Ex parte Rice Jones*, 1850, 1 L. M. & P. 357). If the matter is an indictable offence, it must always be adjourned. Should, however, the matter be one of summary jurisdiction, and the justices be

satisfied that the summons was reasonably served, they may proceed in absence, or issue a warrant for defendant's apprehension, and adjourn the case. A defendant cannot claim an adjournment as of right, to enable him to obtain professional assistance (*Ex parte Biggins*, 1862, 26 J. P. 244), but if the charge has been varied, or if a variance appear in the evidence, he may ask for time to prepare his defence, and this ought not, under ordinary circumstances, to be refused him (11 & 12 Vict. c. 43, s. 1).

Adjudication.—See BANKRUPTCY.

Adjustment of Accounts.—See ACCOUNTS.

Adjustment of Average.—See AVERAGE.

Adjustment of Rights of Contributories.—See COMPANY.

Admeasurement of Dower.—A writ by which an heir could obtain redress against the widow of his ancestor, where the heir, in his infancy, or his guardian, had assigned her more land as her dower than she ought to have. The heir could have no admeasurement if he was of full age at the time when he made the assignment. If the heir, before his guardian entered the land, assigned to the widow an excess of land as dower, he could have no admeasurement during his infancy; but the Stat. Westm. ii. c. 7, granted a writ of admeasurement to his guardian. Forms of writs of admeasurement of dower are given in *Registrum Omnium Brevium*, 1595, at p. 171, *a*. See DOWER.

Admeasurement of Pasture.—A writ brought by a commoner where another commoner had surcharged his common by putting on more beasts than he lawfully might. Under this writ, a jury was summoned to declare how many beasts each commoner might put on the common, and the rights of the commoners generally. The lord could not bring a writ of admeasurement against a tenant, nor a commoner against his lord. For the form of the writ, see *Registrum Omnium Brevium*, 1595, p. 156, *b*. See COMMON.

Ad medium filum viæ.—Where the boundary between two properties, parishes, counties, etc., is a non-navigable river, a road or a ditch, the respective proprietors or authorities are presumed to have control up to an imaginary line or thread (*filum*), drawn through the centre of such river, road, or ditch. See RIPARIAN OWNERS, RIVERS.

Ad melius inquirendum.—A writ which in certain cases lies for directing a second inquisition or inquiry, where the first has been unsatisfactory.

In the case of inquisitions by coroners, the use of the writ has been largely superseded by the powers of the Coroners Act, 1887, 50 & 51 Vict. c. 71, s. 5. See CORONER.

Rules 14 and 15, made under the Escheat Procedure Act, 1887, 50 & 51 Vict. c. 57, provide that a *melius inquirendum* may be awarded from time to time on the fiat of the Attorney-General; or the Lord Chancellor may, in any case of escheat, award a *melius inquirendum*. In lunacy inquisitions, writs *ad melius inquirendum* are not now directed (*Ex parte Cranmer*, 1806, 12 Ves. 454; *Ex parte Roberts*, 1743, 3 Atk. 5; *Ex parte Atkinson*, 1821, Jac. 333; *In re Holmes*, 1827, 4 Russ. 182; Shelford on *Lunatics*, 2nd ed., 142). See LUNACY.

The Crown cannot traverse an inquisition, but a *melius inquirendum* may be granted on behalf of the Crown.

On this subject generally, see *R. v. Bunney*, 1688, 1 Salk. 190; *R. v. Curtis*, 1876, 45 L. J. Q. B. 711; Short and Mellor's *Crown Office Practice*; Jarvis on *Coroners*.

Administering Drugs.—1. Where drugs are administered for a lawful purpose, but with gross negligence and fatal results, the person by whose negligence they were taken is indictable for manslaughter, whether he be or be not a qualified chemist or medical practitioner (*R. v. Webb*, 1834, 1 Man. & R. M. C. 405; *R. v. Spencer*, 1867, 10 Cox C. C. 525; and see as to liability for *mala praxis*, Beven, *Negligence*, 2nd ed., 1390-1406). 2. As to the administration of drugs with intent to murder, to endanger life, cause grievous bodily harm, or to injure, aggrieve, or annoy, see POISON. 3. As to administering drugs with intent to cause miscarriage, see ABORTION. 4. It is felony by Statute (24 & 25 Vict. c. 100, s. 23, re-enacting, with amendments, 14 & 15 Vict. c. 19, s. 3), unlawfully to apply or administer to, or cause to be taken by, or to attempt to apply or administer to, or cause to be taken by, any person, any chloroform, laudanum, or other stupefying drug, matter, or thing, with intent to commit, or enable another to commit, or to assist in committing, any indictable offence. The offence is punishable by penal servitude for life, or any term not less than three years, or with imprisonment for not more than two years (24 & 25 Vict. c. 100, s. 22; 54 & 55 Vict. c. 69, s. 1), and is not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1). There are no reported cases on this enactment. The offence is popularly called *hocussing*, and is usually committed to facilitate robbery. Sexual intercourse with a woman stupefied by drugs being rape (*R. v. Camplin*, 1845, 1 Den. Cr. C. 89), administration of stupefying drugs to a woman, with intent to overcome her resistance to sexual intercourse, would apparently fall within 24 & 25 Vict. c. 100, s. 22. See RAPE.

Administration Action.—The jurisdiction of the Court of Chancery to compel due administration of the personal estate of deceased persons has existed from a very early period. It seems to have been of gradual growth, and founded rather on the necessity of supplying the defects of the Courts of common law and the ecclesiastical Courts, than on execution of trusts cognisable in equity alone.

In the Courts of common law a creditor could merely establish his debt; and as to the deceased's assets, could not obtain discovery of them, or reach them, if equitable, or marshal them, where such course was necessary for payment of his debt. * See EXECUTORS AND ADMINISTRATORS.

The jurisdiction of the Court of Chancery to administer assets and distribute residues, gradually acquired to meet and supplement the defects of other tribunals, was firmly established in the reign of Charles II., when it was held to be unaffected by the Statute of Distributions, on the ground that the Court afforded a more complete and effectual remedy; and thus the Court acquired practically an exclusive jurisdiction. (See Spence, *Equity*, vol. i. p. 578 *et seq.*; Story, *Equity Jurisprudence*, English ed., p. 348 *et seq.*) The jurisdiction of the Court of Chancery as a Court of conscience operated *in personam*, and not *in rem*, and accordingly extended to compel the performance of trusts by executors and trustees personally subject to its jurisdiction, though the subject was not within the jurisdiction, and though the author of the trust might have had a foreign domicile (see *Penn v. Baltimore*, 1750, 1 Ves. Sen. 444, and notes to that case in 2 L. C. Eq., 6th ed., p. 1047 *et seq.*); and accordingly it was always the practice of the Court to decree administration in all such cases. The jurisdiction was not discretionary (at all events in England), and under a long series of precedents the plaintiff in a suit properly constituted had a right *ex debito justitiæ* to a decree (see *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34; and *In re Blake, Jones v. Blake*, 1885, 29 Ch. D., at p. 916). The advantages and disadvantages of this power to throw an estate "into Chancery" are obvious. On the one hand, trustees avoided responsibility in cases of difficulty, and beneficiaries secured the benefit of the Court's control. On the other hand, the powers and discretion of the trustees were fettered, and delay and expense, sometimes inordinate, were incurred. Accordingly, where it was desired merely to obtain the opinion or direction of the Court on some particular point, without a general administration, it became the practice to commence an administration suit, raise the particular point by the pleadings, get an inquiry or direction upon that point, and then stay further proceedings. As to the former practice, see *In re Moore*, 1853, 23 L. J. Ch. 153; Sir George Turner's Act, 13 & 14 Vict. c. 35, s. 19, amended by 23 & 24 Vict. c. 38, s. 14; 2 Dan. Ch. Pr., 5th ed., 1076-1082; 2 Seton, 4th ed., 846-7; Morgan, *Chancery Acts and Orders*, 4th ed., 126, 202-205; and 15 & 16 Vict. c. 86, and 46 & 47 Vict. c. 49. The practice under the two last Statutes has been superseded by that introduced by the Rules of the Supreme Court, as set out below.

By the Judicature Act, 1873, s. 34, the administration of the estates of deceased persons and the execution of trusts were assigned to the Chancery Division of the High Court.

An action for administration may be commenced (1) by writ in the ordinary way; (2) by writ indorsed under Order 3, r. 8, with a claim for an account, upon which, if the defendant fails to appear, or, after appearance, to satisfy the Court that there is some preliminary question to be tried, the ordinary order for an account may be made, on an application in chambers, with all necessary inquiries and directions usual in the Chancery Division in similar cases (Order 15, r. 1); but only common accounts and inquiries will be directed under this rule, and special inquiries cannot be directed (*In re Gyhon, Allen v. Taylor*, 1885, 29 Ch. D. 834); (3) by originating summons under the following provisions:—

Under Order 55, rr. 3 and 4, of the Rules of the Supreme Court, 1883, the executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law or customary heir, or as *cestui-que trust*, or as claiming by assignment or otherwise under any such persons, may take out,

as of course, an originating summons for the determination, without an administration of the estate or trust, of any of the following questions or matters: (a) Any question affecting the rights or interests of the applicant; (b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others; (c) the furnishing of any particular accounts by the executors, or administrators, or trustees, and the vouching (when necessary) of such accounts; (d) the payment into Court of any money in the hands of the executors, or administrators, or trustees; (e) directing the executors or administrators or trustees to do, or abstain from doing, any particular act in their character as such; (f) the approval of any sale, purchase, compromise, or other transaction; (g) the determination of any question arising in the administration of the estate or trust.

Any of the persons who can take out an originating summons under the above provisions may in like manner apply for and obtain an order for the administration of the personal and real estate of the deceased, or the administration of the trust. The power to make an order on summons for the administration of a trust was introduced in 1883, and did not exist under 15 & 16 Vict. c. 86. No order for general administration, or for the execution of a trust, or for accounts and inquiries concerning the property of a deceased person, or other property held upon any trust, or concerning the parties entitled thereto, can be made except by the judge in person.

An originating summons under the above provisions for inquiries or directions without administration takes the place of the former Chancery practice as above stated (see *Re Medland*, 1889, 41 Ch. D., at p. 492). The rule extends only to matters which would, under the former practice, have been determined in an administration action. A question as to a legal devise, or affecting a person claiming adversely to the will of a deceased person, or adversely to a deed of which he seeks the construction, cannot be determined on summons (see *In re Royle*, *Royle v. Hayes*, 1889, 41 Ch. D. 18; *In re Bridge*, *Franks v. Worth*, 1887, 56 L. J. Ch. 779); but the question to whom trustees of a will having the legal estate ought, according to the true construction of the will, to hand over the property, can be so determined (*In re Hargreaves*, *Midgley v. Tatley*, 1889, 41 Ch. D. 401).

Where special or peculiar relief is sought, the proceedings should be commenced by writ. Accounts and inquiries on the footing of wilful default cannot be directed in proceedings by originating summons (*In re Hengler*, *Frowde v. Hengler*, W. N. (1893), 37).

The summons by which the proceedings are commenced is prepared by the applicant in the prescribed form (see R. S. C., App. K, No. 1 A), and is issued by being sealed in the central office (Order 54, r. 4 (b)), and is assigned to one of the judges of the Chancery Division (Order 5, r. 9 (b)). Every subsequent summons relating to the same estate or trust must be marked with the name of the same judge (Order 55, r. 11).

The persons to be served with the summons are the persons interested under clauses (a) to (g) *supra*, or, where general administration is sought, the residuary legatees or next of kin, or residuary devisees or heirs, or some of them, or the executors, administrators, or trustees, as the case may be (Order 55, r. 5); and directions may be given for service on other persons (r. 6), by amendment of the summons. The application must be supported by such evidence as the Court may require, and the Court may give directions for the trial of any questions arising thereout (r. 7), and pronounce such judgment as the nature of the case may require (r. 8), and give special directions as to the carriage or execution of the judgment, or service of it upon persons not parties (r. 9). But the discretion which, as we have seen, was not for-

merly possessed by the Court, has now been conferred upon it, and accordingly it is not obligatory on it to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order (r. 10). Under this rule the Court can restrict the order simply to those points necessary for determination of the question in dispute; and a party interested is entitled to an administration judgment only where there are questions which cannot otherwise be properly determined (*In re Blake, Jones v. Blake*, 1885, 29 Ch. D. 913). The rule applies also to applications under Order 15, r. 1, above mentioned (see *In re Ghyon, Allen v. Taylor*, 1885, 29 Ch. D. 834). Moreover, the Court, in the exercise of its discretion as to costs (under Order 65, r. 1), may order the plaintiff to pay the costs of any unnecessary or improper administration proceedings (*In re Blake, Jones v. Blake, ubi sup.*).

Order 33, r. 6, requires that, in the absence of direction otherwise, every judgment or order for a general account of the personal estate of a testator or intestate shall contain a direction for an inquiry what parts (if any) of such personal estate are outstanding or undisposed of; and, by r. 7, the clauses of a judgment or order containing any directions to be prosecuted in chambers must be numbered, so that the numbered paragraphs and the chief clerk's certificate (as to which see below) may correspond. (For forms of judgments and accounts and inquiries, see 2 Seton, 5th ed., pp. 1184-1188, and R. S. C., App. L, No. 28.)

The usual course of proceedings where a judgment or order for general administration has been made is shortly as follows. Within ten days after the judgment or order has been passed and entered, it must be brought into chambers by the party entitled to prosecute it, and a summons is issued to proceed on it. At the return of the summons the chief clerk of the judge to whom the action is assigned satisfies himself that all necessary parties are before him, or have been served with notice of the judgment, and so have become bound by the proceedings. Service may in certain cases be dispensed with, or substituted service may be ordered (R. S. C., Order 55, r. 35A), and persons may be appointed to represent absent persons. General directions are then given as to the prosecution of the accounts and inquiries ordered. Advertisements are inserted in the *London Gazette*, and the *Times* or local newspapers, for creditors and claimants to come in and prove their claims within a limited period. The personal representative of the deceased examines the claims and files an affidavit verifying them, and stating which should be admitted, and which not, and why; or an affidavit of no claims is made. On the appointed day the claims are adjudicated on, and allowed or disallowed, or further investigation is directed, and notice is given to any creditor whose claim is not allowed to attend and prove it. The personal representative prepares the accounts and verifies them by affidavit, stating also the deceased's funeral expenses and the particulars of his estate at the date of his death and of the affidavit. The accounts are then vouched, as to which special directions may be given. Any party may take the opinion of the judge upon any matter arising in the course of the proceedings. The accounts and inquiries having been duly taken and made, the chief clerk states the result of them in his certificate, which is signed by him and filed, and is then complete, and binding on all parties, unless a summons to vary it is taken out within eight days after the filing. The certificate follows the numbering of the judgment or order, as mentioned above, and under a judgment for general administration states: (1) the personal estate account,

referring to the account as verified by affidavit, with such variations as may have been made therein; (2) the testator's debts, with interest thereon; (3) the funeral expenses; (4) the legacies, with interest, and annuities, given by the testator; (5) the outstanding personal estate; (6) the real estate; (7) incumbrances on the real estate; (8) rents and profits account. Each statement is followed by a statement of the evidence produced on the account or inquiry. (See Dan. Ch. Forms, 4th ed., No. 1410).

After the expiration of the eight days, the action may be set down on further consideration; and if not so set down by the party having the conduct of the proceedings within fourteen days from the filing of the certificate, it may be set down by any other party. The action will not be put in the paper for hearing until after ten days from the day on which it was set down, of which at least six days' notice before the day fixed for the hearing must be given to the other parties (see Order 36, r. 21). At the hearing the action is usually disposed of finally, but further accounts and inquiries may be directed where necessary or advisable, and further consideration adjourned. The further consideration may be taken in chambers where the matter originated, and was adjourned for further consideration, in chambers (see Order 55, r. 72).

A decree for general administration could not be made under the former practice in the absence of a general representative of the estate (*Groves v. Lane*, 1852, 16 Jur. 1061), and this rule has not been altered by the Judicature Acts (*Dowdeswell v. Dowdeswell*, 1878, 9 Ch. D. 294).

In a creditor's action he is usually expressed to sue on behalf of himself and all other creditors of the deceased, though, as far as personal estate is concerned, after the passing of the Act of 1852 above referred to, it was no longer necessary to sue by one creditor on behalf of all (see *In re Greaves*, *Bray v. Tofield*, 1881, 18 Ch. D. 551, 554).

As to the distinction between legal and equitable assets, and the order in which they are liable for the payment of debts, see ASSETS and MARSHALLING.

Under the County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 67, the County Court has all the powers and authorities of the High Court in actions or matters by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next of kin, in which the personal or real or personal and real estate, against or for an account or administration of which the demand may be made, does not exceed in amount or value the sum of £500; and in all such actions or matters the County Court judge has all the powers and authorities, for the purposes of the Act, of a judge of the Chancery Division. If, during the progress of any such action or matter, it appears that the subject-matter exceeds the limit of £500, the validity of any order already made is not affected, but the judge must transfer the action or matter to the Chancery Division (s. 68). (For the County Court practice, see Thompson, *Principles of Equity and Equity Practice of the County Court*, p. 237 *et seq.*)

Under sec. 122 of the Bankruptcy Act, 1883, where a judgment has been obtained in a County Court against a debtor who cannot pay the amount forthwith, and who alleges that his whole indebtedness does not exceed £50, the County Court may make an order for the administration of his estate, and such order operates as a stay of proceedings in any County Court or inferior Court; and under the Bankruptcy Rules, 358, the County Court may make an administration order in lieu of an order for committal under sec. 5 of the Debtors Act, 1869, or of a receiving order. (For General Rules under sec. 122, see Williams, *Bankruptcy*, 6th ed., p. 573.)

Under sec. 125 of the Bankruptcy Act, 1883, provision is made for the administration in bankruptcy of the estate of a deceased insolvent on the petition of any creditor whose debt would have been sufficient to support a bankruptcy petition against him. No such petition can be presented after administration proceedings have been commenced in any Court; but that Court may, on proof of the insolvency of the estate, transfer such proceedings to the Court of Bankruptcy. Upon the order being made, the debtor's property vests in the official receiver as trustee, who realises and distributes it in accordance with the provisions of the Act; and the accounts, list of creditors, etc., are made and verified in accordance with the practice in the Chancery Division. (See Williams, *Bankruptcy*, pp. 311-315; and Bankruptcy Act, 1890, s. 21; Bankruptcy Rules, 277-279A; see also ACCOUNTS AND INQUIRIES; BANKRUPTCY.)

Administration Bond; Administrators. — See EXECUTORS AND ADMINISTRATORS.

Administrative Areas.—See LOCAL GOVERNMENT.

Administrative County.—The expression “administrative county” means the area for which a county council is elected, in pursuance of the Local Government Act, 1888, s. 100. See LOCAL GOVERNMENT.

Admiral.—An admiral is an officer of the Crown, exercising its jurisdiction by sea. The name is not found before the time of the Crusades, and it is generally derived from the Arabic *emir* (which is favoured by the French form of the same word *amiral*, and Milton's spelling it as *ammiral* in the *Paradise Lost*). It seems that there was, in early times, an officer of State entrusted by the Crown with the command and charge of the sea, known as the *custos maris* or *locum tenens regis super mare*, and in the reign of Edward I. as “the admiral.” During this reign there seem to have been also three or four admirals appointed for the English seas, with particular limits to the command of each one, and there was an admiral of the Cinque Ports. See CINQUE PORTS. The first admiral so called in England is said to have been William de Leybourne in 1286; and the first admiral of England, so called, seems to have been Sir Thomas Beaufort, half-brother of Henry IV., who was made admiral of the fleet and admiral of England, Ireland, and Aquitaine for life in 1408; though by another account Richard Fitz Mar, Earl of Arundel and Surrey, in Richard II.'s reign in 1386, was the first to have this title. The best account of the admiral's office is given by Sir John Nicholl, Judge of the Admiralty Court, in the case of *R. v. Forty-nine Casks of Brandy* (1836, 3 Hag. Adm. 257). “In early times there were occasionally more Lord-Admirals than one, not, however, of the same part of the coast, but one from the Thames northward, and one thence southward, besides the Lord Warden of the Cinque Ports, but not interfering with each other. Which, however, was the more ancient form of executing this office, whether by one officer or several, is mere conjecture, and it is so stated in the *Matter of the Whale* (*Lord Warden of Cinque Ports v. The King in his Office of Admiralty*, 1831, 2 Hag. Adm. 438, Dr. Phillimore). But however that may be, I am not aware that more than one Lord

Admiral has been appointed since the time of Henry VIII., and the Statute only speaks of the Lord Admiral." The office is in part executive and in part judicial. The Lord Admiral was to fit out and manage all the marine force of the country, to build ships, to appoint officers, to command the ships at sea by himself and his officers. His judicial duties were to be executed by his lieutenant, as judge of the Court, who had jurisdiction over all matters arising upon the high seas, and was appointed by the Lord High Admiral, till the time of William and Mary, when Lord Pembroke was appointed by the Crown under the great seal and for life. The patent of Lord Pembroke grants to him during pleasure, as all these offices are granted, the office of Lord High Admiral of England, Ireland, and Wales, and all dominions and territories, enumerating those in parts beyond the seas thereto belonging. It gives him all rights, perquisites, and jurisdictions of the office, among them derelicts, flotsam, jetsam, lagan; it also gives him the command of the forces at sea, the appointment of officers, and the direction of building, repairing, fitting out, and manning all ships of war. Since 1660 there have been only four Lord High Admirals—the Duke of York, under Charles II.; the Earl of Pembroke, under William III.; Prince George of Denmark, under Anne; and the Duke of Clarence, under George IV., who was assisted by a council (7 & 8 Geo. IV. 65); and since 1827 the office has been in commission. The administrative powers of the office are now exercised by the Admiralty, and the judicial by the Admiralty Division.

(See ADMIRALTY, THE, and ADMIRALTY DIVISION.)

The Crown also in former times made grants to certain persons to be admirals or exercise Admiralty jurisdiction within certain places independently of the Lord High Admiral; but any military power that they may have had has long ceased to exist, and their Admiralty jurisdiction only extends to the civil rights conferred on them, such as the rights to wrecks or other droits of Admiralty found within the limits of their manors, and these rights are now controlled by the general statutory provisions as to wrecks (M. S. A., 1894). In the case of *R. v. Forty-nine Casks of Brandy (supra)*, the successor in title of Sir Christopher Hatton, Chancellor to Queen Elizabeth, to whom that queen had granted to be admiral of Corfe Castle and the Isle of Purbeck, successfully claimed certain casks which had been washed ashore on his land; but others which were found floating and not touching the ground within three miles from the shore went to the Crown as droits of Admiralty. Sir John Nicholl in that case intimates an opinion that the Crown had not the power to grant such jurisdiction on the high seas, *i.e.* below low-water mark, to any subject.

Except in this sense, the name is now only applied to officers holding the highest rank in the royal navy. Admirals have various grades of rank, *viz.* admirals of the fleet, admirals, vice-admirals, and rear-admirals, the numbers of each rank being fixed by Admiralty regulations, made under Orders in Council. They are flag-officers, *i.e.* officers commanding squadrons of ships, and were formerly distinguished by belonging to the White, Blue, and Red squadrons of the Fleet respectively. The Red squadron, which had not existed for a century before 1806, was then revived in commemoration of the victory of Trafalgar. These divisions were abolished in 1864, and the distinguishing flags of these officers are now—for an admiral of the fleet, the Union Jack at the mainmast head; while admirals, vice-admirals, and rear-admirals hoist a white flag with a red St. George's Cross at the mainmast, foremast, and mizzenmast head respectively; and if the ship be one-masted, in the case of a vice-admiral one red ball is added in the upper left quarter of the flag, and two red balls in the case of a rear-admiral.

Their combatant powers, duties, and liabilities are defined in the Naval Discipline Act of 1866, 29 & 30 Vict. c. 109, and the Admiralty Regulations. Among them is the power of authorising the arrest of offenders against that Act, by warrant under their hand (s. 50); and it seems that an order to arrest without a warrant is sufficient generally (*R. v. Cuning*, 1887, 19 Q. B. D. 13). Civilly, like all other naval officers, they are exempt from serving as jurymen or churchwardens (Jury Act, 1870, s. 9 and sched.; Prideaux, *Churchwardens' Guide*, p. 12). See NAVY.

[Comyn's *Digest*, "Admiral"; *Encyclopædia Britannica*.]

Admiralty Action.—Every action may be said to be an Admiralty action which is maintainable in the Admiralty Division, whether it was, before the Judicature Act, 1873, peculiar to the Admiralty Court, or triable concurrently there and in the Common Law and Chancery Courts. The former kind of actions are now expressly assigned to the Admiralty Division (Judicature Act, 1873, s. 35); the latter, though assignable to any Division of the High Court (S. C. R. 1883, Order 5, r. 5), are in practice, where advantage can be taken of the process *in rem*, which is only available in the Admiralty, generally assigned or tried there. The Admiralty Court formerly exercised jurisdiction by two kinds of process—one *in personam*, the other *in rem*. By the former, the person of the defendant was arrested and detained till he gave security to answer the claim; by the latter, the property which had given rise to the cause of action, could be arrested and made liable to satisfy the plaintiff. In early times, the former was the regular method, the latter being only resorted to when the person of the defendant could not be attached; but the former has now become obsolete, the last instance of its exercise being said to have been in 1780 (*The Clara*, 1855, Swa. Ad. 1). The process *in rem* since that time has been the distinctive Admiralty process, in all cases where a *res* or property at sea was concerned, and it has accompanied all the additions made to Admiralty jurisdiction. But the Admiralty Court also had an inherent power to exercise jurisdiction *in personam* in the ordinary way, and could make use of it in all cases where an action *in rem* would have been available, if the *res* had not been inaccessible to the process (e.g. vessel sinking which had caused a collision), except in the case of bottomry (and wages before power was given by Admiralty Act, 1861), and also in certain cases of injury done to person or property, by persons on the high seas; what those persons were it is not clearly settled, except that certainly they did not include pilots, nor perhaps masters of ships. "The Court of Admiralty exercised jurisdiction *in personam*, wherever there was a proceeding *in rem*, but then it limited the damages recoverable to the value of the *res*. It exercised a personal jurisdiction in the nature of a disciplinary authority, as for assault by officers of ships on the high seas, where there was no jurisdiction *in rem*. But this, as in *The Ruckers*, was done with hesitation when the plaintiff was not one of the ship's company, but only a passenger, though the proceeding was against the master" (Kay, L. J., *R. v. City of London Court Judge* [1892], 1 Q. B. 273; and see Lord Herschell, *The Zeta* [1893], App. Cas. 468; *The Heinrich Bjorn*, 1886, 11 App. Cas. 270). Whenever new jurisdiction was given to the Court by statute, it was made exercisable both *in rem* and *in personam* (Admiralty Act, 1861, s. 38).

The following causes were within the exclusive jurisdiction of the Court:—*Salvage* both on the high seas and within the body of an English

county (Admiralty Act, 1840, s. 6); *life salvage* of persons on board British ships in any waters, and foreign ships in British waters, or anywhere with the consent of their governments (M. S. A., 1854, s. 458; and 1862, s. 59; and Admiralty Act, 1861, s. 9, now consolidated in M. S. A., 1894, s. 544); *bottomry*; *necessaries* supplied to foreign ships, or ships owned by persons not domiciled in England or Wales (Admiralty Court Acts, 1840 and 1861); *possession of ships*. It has also been said that any action *in rem* could be brought in the Admiralty Court upon a foreign judgment *in rem*, in order to enforce it in England (*The City of Mecca*, 1879, 5 P. D. 28; Sir R. Phillimore in the Court of Appeal (6 P. D. 106); Baggallay, L. J., seems to doubt this, Jessel, M. R., to support it. The following actions belonged to the Admiralty concurrent jurisdiction:—*Collision or damage*, both to property and persons, by ships (Admiralty Act, 1861, s. 7; *The Theta* [1894], Prob. 280), whether on the high seas or in the body of an English county (Admiralty Court Act, 1840, s. 6), and in foreign waters, even in inland waters, whether the ships are foreign or British (*The Diana and The Courier*, 1863, Lush. 593 and 541); damage to ships caused by persons on board other ships, *e.g.* officer in charge of a Queen's ship (*The Swallow*, 1856, Swa. Ad. 30); and injury by persons to persons (see above, *The Ruckers*, 1801, 4 Rob. C. 73); *damage to cargo* carried in any foreign ship to a port in England or Wales (Admiralty Court Act, 1861, s. 6); *towage* on the high seas and within a county (Admiralty Act, 1840, s. 6); *wages and pilotage*, earned by masters, seamen, and any persons employed on board a ship, whether British or foreign, in the latter case with the consent of the ship's consul, under any kind of contract, and *disbursements* by master on account of the ship (M. S. A., 1854, s. 191; and Admiralty Court Act, 1861, s. 10; now re-enacted in M. S. A., 1894, ss. 155–167, and 742); *mortgage*, in actions by mortgagees of a ship, if she is under process of the Court (Admiralty Court Act, 1840, s. 3), or if the mortgage was registered under the Merchants' Shipping Acts (Admiralty Court Act, 1861, s. 11); questions as to the *title, ownership, and management* of ships. Besides these there is also the action for limitation of liability, by which shipowners can limit their liability for loss done without their actual fault or privity by their ships to other ships, to £15 per ton, in case of loss of life, and £8 per ton otherwise; jurisdiction in such actions was at first given exclusively to the Chancery Court (M. S. A., 1854, s. 514), but the Admiralty Court obtained concurrent jurisdiction over them in 1861, in cases where the ship was under process of the Court; and since 1873 the Division has the same powers as the Chancery Court had before.

The Admiralty jurisdiction of the County Courts is perhaps the best illustration of what is meant by Admiralty actions. All of them have a common-law jurisdiction limited to claims of £50; those of them which are given Admiralty jurisdiction can try the following causes up to a much higher limit, namely, *salvage*, where the value of the salved property does not exceed £1000, or the claim for reward £300; *towage, necessaries, and wages*, actions where the claim does not exceed £150; claims for *damage to cargo* or by *collision* (*q.v.*), up to £300; and in any of the above actions beyond the statutory limit if the parties so agree (County Courts Admiralty Act, 1868, s. 3). This Act has been declared to mean that the County Courts thereby enjoy the same jurisdiction as the Admiralty Court possessed at the time when the Act passed (*R. v. Judge of City of London Court* [1892], 1 Q. B. 272). Another Act, that of 1869, adds to the preceding one a jurisdiction over claims arising out of breaches of charter-parties, and other contracts for carriage of goods in foreign ships, or torts in respect

thereof (s. 2). This Act gives the County Courts a jurisdiction which is not limited by that which the Admiralty Court had at the time of the Act being passed (*The Cargo ex Argos*, 1873, L. R. 5 P. C. 134; *The Aline*, 1880, 5 Ex. D. 227). This jurisdiction is not affected by the general County Courts Act of 1888, which is to be read as one with the special Acts.

The process *in rem* is described under ARREST OF SHIP; that *in personam* is the same as the ordinary action in the other Divisions of the High Court. See ACTIONS IN THE HIGH COURT. The procedure in Admiralty actions is governed by numerous orders and rules of the Supreme Court, which are set out in Williams and Bruce, 605–622.

For the various actions considered in detail, see BOTTOMRY; COLLISION OR DAMAGE; CARGO; MORTGAGE; NECESSARIES; PILOTAGE; POSSESSION; SALVAGE; TOWAGE; WAGES.

[Williams and Bruce, *Admiralty Practice*; Roscoe, *Admiralty Practice*.]

Admiralty Advocate.—See ADVOCATE, QUEEN'S.

Admiralty Division.—This is a Division of the High Court consisting of two judges (who also hear Probate and Divorce causes), which exercises all the jurisdiction formerly possessed by the High Court of Admiralty (Judicature Acts, 1873, ss. 16, 22, 31, 36, and 1875, s. 11) as well as that directly given to itself. An account of its position thus involves a description of the powers of the Admiralty Court, which it succeeded. It is beyond the limits of this article to enter even cursorily on the history of that Court (which will be found in Williams and Bruce, *Introduction*, and in the arguments and decisions in *R. v. Judge of City of London Court* [1891], 1 Q. B. 273, and *The Zeta* [1893], App. Cas. 468), beyond saying that it was a Court of great antiquity,—the Admiral and Court of Admiralty have been time out of mind, and so it was said in the time of Richard I. (Co. Lit., quoted by Com. Dig. Adm.),—in which the Lord High Admiral or his lieutenant exercised civil and criminal jurisdiction over matters and offences arising on the high seas, certainly from the time of Edward III. It was a Court of limited jurisdiction, liable to prohibition by the Courts of common law, which, by statutes and prohibitions, strictly confined its jurisdiction to matters on the high seas (13 Rich. II.; 15 Rich. II. 3; 2 Hen. IV. 11) until 1861, when it was made a Court of Record. See COURT OF RECORD. Its jurisdiction was original and statutory, the latter being given to it mainly by enactments of the present reign. It was on the one hand an Instance Court, exercising civil and criminal jurisdiction, and on the other a Prize Court. Its prize jurisdiction, however, was not inherent, but was granted to it by special commission from time to time, and it does not go back further than the middle of the seventeenth century (*Lindo v. Rodney*, 1782, Doug. 613, Lord Mansfield); it was, however, made part of its regular jurisdiction by the Naval Prize Act of 1864.

The criminal jurisdiction of the Instance Court extended over all offences committed on the high seas, not triable by the Common Law Courts, viz. murder, treason, piracy, and felony on the high seas, and murder, may hem in great ships hovering in the main stream of great rivers beneath the bridge of such rivers nigh the sea (15 Rich. II. 3); and by 28 Henry VIII. c. 25, a special commission was established to exercise this jurisdiction, consisting of the admiral and his deputy and others, usually common-law judges, according to the law of the land. But in 1835, when the Central Criminal

Court (*q.v.*) was established, this jurisdiction was transferred to it, the judge of the Admiralty being made a member of that tribunal; and in 1844 all offences committed within the jurisdiction of the Admiralty were made triable in the county where the offender was in custody, as if they had been committed in that county. The Admiralty Court, till 1866, had also authority to administer discipline in the Royal Navy, but this is now performed by naval courts-martial.

The civil jurisdiction inherent in the Instance Court seems to have been restricted to torts to property, and in some cases to persons, and salvage on the high seas, suits for possession of ships where no claim of title was raised, hypothecation or bottomry of ships' freights and cargoes, seamen's wages not earned under a special contract, restitution of goods piratically seized on the high seas, and forfeiture of the goods of pirates as *droits* of Admiralty. The law which it administered was the general maritime law, as adopted by itself from maritime customs and laws common to all nations, and codes of sea law such as the Laws of Oleron (composed by our Richard I.) and the Consulate of the Sea. "The law which is administered in the Admiralty Court of England is the English maritime law. It is not the municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, had adopted as the English maritime law. This is what every judge in the Admiralty Court of England has promulgated (Lord Stowell and those before him and Dr. Lushington after him), and I do not understand that the present learned judge of the Admiralty Court (Sir Robert Phillimore) differs in the least from them" (Brett, L. J., in *The Gaetano v. Maria*, 1882, 7 P. D. 143). "Neither the laws of the Rhodians nor of Oleron nor of Wisby nor of the Hanse Towns are of themselves any part of the law of England. . . . But they contain many valuable principles and statements of marine practice, which, together with principles found in the *Digest*, and in the French and other ordinances, were used by the judges of the English Court of Admiralty when they were moulding, and reducing to form, the principles and practice of their Court" (Lord Esher, M. R., *Gas Float Whitton*, No. 2 [1896], Prob. 47).

The following jurisdiction was given to the Court by modern statutes: power to decide the title to or ownership of any ship or its proceeds, and claims for salvage, damage, towage, and necessities supplied to a foreign ship within the body of a county as upon the high seas (Adm. Act, 1840, s. 6); and power to try questions of booty of war (*i.e.* land prize), whenever such shall be referred to it by the Crown (*ibid.* s. 22; see *BOOTY*); over claims by material-men (*e.g.* builders) against a ship under arrest of the Court; necessities supplied to any ship elsewhere than in ports to which she belongs if no part owner of her reside in England or Wales; damage done by any ship; damage to cargo carried in a foreign ship into any port in England or Wales; questions of co-ownership; life salvage from a British ship anywhere, or from a foreign ship in British waters and elsewhere with the consent of its government (now re-enacted in M. S. A., 1894, ss. 544 and 545); wages and disbursements of masters of ships (Adm. Act, 1861, ss. 9-10). It also was given power to decide claims by Queen's ships for captures from pirates, and to condemn all such captured property as *droits* of Admiralty, subject to the owners' right to recover it on paying one-eighth of its value as salvage (1850, 13 & 14 Vict. c. 26, s. 2). It was made a regular Prize Court, with power to decide questions of ransom, petitions of right in prize cases, punish disobedience of convoyed ships to the man-of-war in charge of them, and award damages to convoyed ships exposed to danger by the

officer in charge of the convoy (Prize Act, 1864, ss. 1, 2, 45, 46; Naval Discipline Act, 1866, s. 30; see PRIZE). It had jurisdiction to decide questions of seizure of ships under the Foreign Enlistment Act, 1870, s. 19 (see FOREIGN ENLISTMENT); to punish merchant ships for carrying improper colours, or assuming a nationality which they did not possess, and to remove masters of ships, on the application of persons interested in them (now given to the High Court by M. S. A., 1894, ss. 73 and 472). By the Admiralty County Courts Act, 1868, it was made the Court of Appeal from County Courts in Admiralty causes.

Since the Court has been merged in the Division, the latter has received jurisdiction in cases under the Slave Trade Act, 1874; and the Pacific Islands Kidnapping Act, 1875. It would probably exercise the duty of the High Court to hear appeals from decisions of Courts of summary jurisdiction, naval courts, or a wreck commissioner, or a stipendiary magistrate, in inquiries into maritime casualties (M. S. A., 1894, s. 475); from Colonial Courts of Inquiry into maritime casualties (*ibid.* s. 478); and from summary decisions of County Courts in salvage causes (*ibid.* s. 547). In practice, the judges of the Admiralty Division do not exercise criminal jurisdiction, though as judges of the High Court they can do so; and in *R. v. Keyn*, 1876, 2 Ex. D. 63, a case which led to the passing of the Territorial Waters Act, 1878, extending the criminal jurisdiction of the admiral over all offences committed within three miles of the English coast, Sir Robert Phillimore, then judge of the Admiralty Division, sat as a member of the Court for Crown Cases Reserved. (Williams and Bruce, *Admiralty*.)

Admiralty, Droits of.—See ADMIRALTY, THE; CAPTURE; DECLARATION OF WAR; ENEMY'S GOODS.

Admiralty, The.—In any Act of Parliament the expression "the Admiralty" means the Lord High Admiral of the United Kingdom, for the time being, or the commissioners for the time being for executing that office (Interpretation Act, 1889, s. 12 (4)). The Admiralty Office is the State Department which exercises the administrative powers of the Lord High Admiral (see ADMIRAL), by means of commissioners appointed by the Crown for that purpose, and known as the Lords Commissioners of the Admiralty. The office of Lord High Admiral was first put in commission in 1632; during the Commonwealth it was administered by a committee of Parliament; in 1690, under William and Mary, it was again put in commission, and, with a few short intervals, when a Lord High Admiral was appointed, it has so remained ever since. The commissioners consist of the First Lord, whose position is equal to that of a principal Secretary of State, and who is responsible to the Crown and to Parliament for the Department; four Naval Lords (naval officers), of whom the senior ones are responsible for the personnel of the Navy, and the third, the comptroller, is responsible for its material; and a Civil Lord. The Admiralty Board comprises the commissioners, and also a Financial and a Permanent Secretary (Anson, *Law of Constitution*, "Crown," 86, 393). The Board administers and controls the affairs of the Royal Navy, and by the Army Act, 1881, s. 179, those of the Royal Marines. In this capacity it grants all commissions held by officers in the Navy and Marines; its leave is necessary before any commission can be resigned (*R. v. Cuming*, 1887, 19 Q. B. D. 13; *Hearson v. Churchill* [1891], 2 Q. B. 144); and its consent is

requisite before any salvage reward is allowed to be claimed by any of the Queen's ships for services rendered to other vessels (M. S. A., 1894, s. 557; for form of consent, see *The Cargo ex Woosung*, 1876, 1 P. D. 262). Although there is no jurisdiction to issue process against the Lords of the Admiralty personally, in cases of damage or salvage, or the like, where the Queen's ships are concerned, the Admiralty generally appear to defend the action when brought against the officer in charge. It may bring actions in its own name to protect its public property, such as naval stores and equipments, and its rights in contract and tort (1868, 31 & 32 Vict. c. 78); it may acquire land for public purposes either by agreement or compulsorily (1864, 27 & 28 Vict. c. 57; 1865, 28 & 29 Vict. c. 124); for coastguard service (1856, 19 & 20 Vict. c. 83); it has general rights and powers over dockyards (1865, 28 & 29 Vict. c. 125); it administers Greenwich Hospital (28 & 29 Vict. c. 89), to which it is empowered to hand over any undisposed-of residue of officers', sailors', or marines' effects, after the lapse of a certain time from their deaths (28 & 29 Vict. c. 111, and (1889) 52 & 53 Vict. c. 42, s. 30).

One branch of the Lord High Admiral's original administrative powers, viz. the droits or perquisites of Admiralty, has been reserved to the Crown since 1702, when Prince George of Denmark, then Lord High Admiral, surrendered all the rights, profits, perquisites, and advantages belonging to the office, in consideration of a fixed yearly sum of £7000 a year (which, by an Act of George II., was divided among the Commissioners). To quote Sir J. Nicholl: "To the office of Lord High Admiral certain perquisites belonged from time immemorial, and it is to the king in his office of Admiralty that these droits now belong, unless, by authority of Parliament, they are otherwise applied" (*R. v. Forty-nine Casks of Brandy, ante*). By a statute of the first year of the Queen's reign, these droits, as part of the Crown hereditary revenues, go to the Consolidated Fund (1 & 2 Vict. c. 2, s. 7), as they did under William IV. *Droits of Admiralty* comprehend all ships, boats, or cargoes derelict on the high seas, flotsam, jetsam, and lagan, treasure, deodands, and wrecks, not granted by the Crown to subjects, e.g. lords of manors; of all these the Lord High Admiral had the custody, and if no owner appeared to claim them within a year and a day, the Court of Admiralty condemned them as his property. This jurisdiction still exists, and is vested in the Admiralty Division; but where such property is found within the tidal waters of the United Kingdom, it is dealt with under the provisions of the Merchant Shipping Act, 1894, ss. 510-529; and if unclaimed in a year, is forfeited to the Crown. The Act, however, only applies to British tidal waters; and derelicts, etc., found on the high seas, do not seem to be affected by it. They belong to the Crown, subject to rewarding the salvors, for which power is reserved by 1 & 2 Vict. c. 2, s. 12 (*The Aquila*, 1798, 1 Rob. C. 43; *R. v. Derelicts*, 1825, 1 Hag. Adm. 383; *The Dantzic Packet*, 1837, 3 Hag. Adm. 385), after suit in the Admiralty Division. Admiralty droits also include all royal fishes, such as whales, sturgeons, porpoises (Sir L. Jenkins, i. 89 and 98); all ships or goods of the enemy taken without commission from the Admiralty (1864, Prize Act, s. 39), or found in "ports, creeks, or roads in the British dominions, unless they come in voluntarily upon revolt, or are driven in by the king's cruisers," i.e. if they do so by accident or ignorance (Order in Council of 1655; *The Rebekah*, 1799, 1 Rob. C. 227; *The Maria Francaise*, 1806, 6 Rob. C. 297; *Raft of Russian Timber*, 1859, 5 Jur. N. S. 1109); all goods taken from pirates, and belonging to them after they have been convicted of piracy (*The Panda*, 1842, 1 Rob. W. 423); but a sale of piratical property to an

innocent purchaser prevented the forfeiture attaching (*The Telegrafo*, 1871, L. R. 3 P. C. 673). All property recaptured from pirates by ships of the Royal Navy pays one-eighth of its value as salvage to the captors, and the residue, if unclaimed by the owners, becomes a droit of Admiralty (1850, 13 & 14 Vict. c. 26, s. 5). There is an important difference between the Crown's rights, *jure coronæ*, and those in its office of Admiralty as regards captures of enemy's ships. The property in prizes belongs to the Crown, though in practice it abandons its rights in favour of the captors (Prize Act, 1864, s. 55); but the captors must have a commission from the Admiralty, or the captured property is a droit of Admiralty. Thus it was held that if soldiers from the land take a ship which is at sea, that is a droit of Admiralty; and that, if an uncommissioned ship assist a commissioned ship in taking a prize, the latter will only get half of the value, and the other half is an Admiralty droit (*The Rebekah*, above). The Admiralty may buy, without condemnation, goods on board a foreign ship, taken while carrying them to the enemy (Prize Act, 1864, s. 38).

All civil droits of Admiralty now vest in the Board of Trade (17 & 18 Vict. c. 20, s. 10, 1854), and are dealt with by them according to the provisions of the Merchant Shipping Act, 1894, where they are found within British jurisdiction, and beyond that limit (three miles from the shore), at their discretion. When sold, droits of Admiralty are subject to the same duties as if they had been regularly imported (39 & 40 Vict. c. 35, s. 1, sched.); and all wreck (which expression includes jetsam, flotsam, lagan, and derelict) brought or coming into the United Kingdom or Isle of Man, if foreign goods, pay the same duty as if they had been imported (M. S. A., 1894, s. 569). The institution of Colonial Courts of Admiralty does not alter the right of the Crown to the droits of Admiralty or droits of forfeitures to the Crown in any British possession; but the Crown may direct that any such droits and forfeitures shall form part of the revenues of that possession, either for ever or for a fixed time (Colonial Courts of Admiralty Act, 1890, s. 27).

Admission in Criminal Cases.—An admission in criminal cases is any statement made by an accused person of his guilt, or of any fact or circumstance tending to prove it; or any assent to any statement made in his presence and hearing, relative to any fact within his knowledge. To be admissible in evidence against the person making it, such admission must be proved by the prosecutor to have been made freely and voluntarily, and not to have been preceded by any threat or inducement by any person in authority (*R. v. Thompson* [1893], 2 Q. B. 12). There is some divergence of judicial opinion as to the admissibility of answers to questions put by the police without caution to persons then in custody or subsequently arrested (*R. v. Brackenbury*, 1893, 17 Cox C. C. 618, and note). See CONFESSION.

Admission of Solicitor.—See SOLICITOR.

Admissions may for convenience be divided into (A) direct admissions, made for the purposes of an action under the rules of practice; and (B) relevant admissions, constituting, with the DECLARATIONS (of dead persons) and the CONFESSIONS (of prisoners), exceptions to the rule

which excludes from proof statements not made upon oath by a witness in the action as being **HEARSAY**.

Note.—In the following article, T. means Taylor on *Evidence*; R. N. P., Roscoe's *Nisi Prius Evidence*, 16th ed.; and S., Stephen's *Digest of Evidence*.

(A) **DIRECT ADMISSIONS**.—1. *By Pleadings*.—Every allegation of fact in any pleading, not being a petition or summons, if not denied, or stated to be not admitted in the pleading of the opposite party, is taken to be admitted, except as against infants or persons of unsound mind (Order 19, r. 13). An evasive denial, not denying the substance of an allegation, may in effect admit it, wholly or in part (Order 19, r. 19). But damages and their amount are taken to be denied unless expressly admitted (Order 21, r. 4). And if the plaintiff does not deliver a reply, all material statements of fact in the pleading last delivered are taken to be denied and put in issue (Order 27, r. 13).

2. *By Payment into Court*.—If money is paid into Court under Order 22 without denial of liability, the defendant is taken to admit the claim or cause of action in respect of which the payment is made (Rule 1); but such payment does not, apparently, conclusively admit that the whole of the sum paid in is due (*Gray v. Bartholomew* [1895], 1 Q. B. 209; *The Mona*, 1894, Prob. 265), as does payment in an action for libel under Lord Campbell's Act (*q.v.*; *Dunn v. Devon Newspaper Co.* [1895], 1 Q. B., p. 211, *n.*). The admission is no more than that something, not exceeding the sum paid in, is due, not that something is due upon each item of an account (*Hennell v. Davies* [1893], 1 Q. B. 367).

3. *Upon Notice*.—A party may, by notice in the specified form, call upon the opposite party to admit any document, saving all just exceptions, under penalty of the costs of proof, in any event, unless the judge certify that the refusal to admit was reasonable. And no costs of proving any document will in general be allowed unless such notice has been given (Order 32, r. 2; T. s. 724 A, B). A party may also, by notice in writing in the specified form, at any time not later than nine days before the day for which notice of trial is given, call upon the opposite party to admit specific facts for the purposes of the action only, under the like penalty, and such admission of facts cannot be used for the purposes of any other action, or in favour of any party other than the party giving the notice. It may be withdrawn or amended by leave of the judge (Order 32, r. 4). An admission of documents or facts under the order may be proved by an affidavit of the plaintiff's solicitor or of his clerk (Rule 7).

4. *By Order*.—Upon a summons for directions under Order 30, r. 7, the judge may order the defendant to admit matters not really in dispute for the purposes of the action, and such orders have been frequently made in commercial causes (see Mathew's *Com. Cas.* vol. I., Introduction, 9).

5. *By Answers to Interrogatories*.—See **INTERROGATORIES**, and below (B (2) and B (5)).

6. *Judgment on Admissions*.—The plaintiff may at any stage, where admissions of fact have been made, apply for such judgment as he is then entitled to thereon, and the judge may make such order as he thinks just (Order 32, r. 6). The application is usually made by motion (*Cook v. Heynes*, 1884, W. N. 75). See **SHORT CAUSE**.

(B) **RELEVANT ADMISSIONS**.—1. *Definition; Proof*.—A statement, whether oral or written, although not made upon oath as evidence for the purposes of the action, and any act or omission, which suggests an inference as to any fact in issue, and is made or done or omitted by a party, or by someone who can make admissions on his behalf, may be given in evidence

against that party. For example, an attempt to suborn false evidence may be proved, because it suggests that the person who made it knew he had a fraudulent case (*Moriarty v. L. C. & D. Rwy. Co.*, 1870, L. R. 5 Q. B. 314). A copy of a document supplied by a party to his opponent is evidence against him of the contents of the document (*Stowe v. Querner*, 1870, L. R. 5 Ex. 155); an offer, if not without prejudice (see below (2)), is evidence of some liability (*Wallace v. Small*, 1830, Moo. & M. 446). Silence or acquiescence may be evidence of assent to a claim or allegation. See ACQUIESCENCE.

Such statement and conduct, when not made relevant only because of the death of the person who made them (see DECLARATION), are in civil cases described generally as "admissions." They are primary evidence (T. ss. 723, 793), and may be proved by the testimony of any witness to them, without calling the person to whom they were addressed (*Woolway v. Rowe*, 1834, 1 Ad. & E. 114); so that they are admissible to prove the contents of a document of which secondary evidence could not be given (*Slatterie v. Pooley*, 1840, 6 Mee. & W. 664); so also the answers made by a bankrupt upon his examination may be proved by a shorthand writer who took a note of them, although the bankrupt has not signed the transcript (*R. v. Erdheim* [1896], 2 Q. B. 260; *Milward v. Forbes*, 1802, 4 Esp. 172).

2. *Exceptions.—Compulsion; Without Prejudice.*—Statements made under constraint cannot, apparently, be given in evidence, if the constraint was illegal,—as, for example, if a party is compelled by the Court to answer incriminating questions upon cross-examination (*R. v. Garbett*, 1847, 1 Den. Cr. C. 236; *R. v. Coote*, 1873, L. R. 4 P. C. 599; *Stockfleth v. De Tastet*, 1814, 4 Camp. 10; 15 R. R. 720; T. s. 798); otherwise they can. Thus an answer to interrogatories, although in another action (*Fleet v. Perrins*, 1869, L. R. 3 Q. B. 536; 4 Q. B. 500), or evidence upon examination in Court in another cause (*Collett v. L. Keith*, 1802, 4 Esp. 212), may be used. Admissions and, in particular, offers, made either expressly "without prejudice" to the issue, or some of the issues, in question (see *In re Daintrey* [1893], 2 Q. B. 116), or impliedly so, because made only "for peace" (Bull. N. P. 236b; T. s. 795; *Paddock v. Forrester*, 1842, 3 Man. & G. 913), cannot be given in evidence at the trial, even to influence the judge to give or refuse costs (*Walker v. Wilsher*, 1889, 23 Q. B. D. 335), or for any purpose except to explain delay in taking action (S. C.). A negotiation commenced by a letter "without prejudice" is wholly covered by the protection (*Paddock v. Forrester*, *supra*; *Ex parte Harris*, 1875, 44 L. J. Bk. 33). As to privileged statements to legal advisers, see PRIVILEGED COMMUNICATIONS.

3. *Admissions on behalf.*—The statements and conduct of any party to the action are relevant as admissions whether the party sue for his own benefit or not (R. N. P. 67; S. art. 16; the statement to the contrary, as regards nominal parties, in *Taylor* (T. s. 741), is not supported by the cases cited, which merely show that the Court would summarily set aside a plea founded upon a release fraudulently given by the nominal party (*Johnson v. Holdsworth*, 1835, 4 Dowl. 63); or order the release itself to be cancelled (*Payne v. Rogers*, 1780, Doug. 407). "What the plaintiff on the record has said is always evidence against him, its weight being more or less. Even if the plaintiff is merely a nominal plaintiff, a bare trustee for another, though slight in such a case, still it would be admissible" (*per* Blackburn, J., in *Moriarty v. L. C. & D. Rwy. Co.*, 1870, L. R. 5 Q. B. p. 320). Any party may give notice, by his pleading or otherwise, in writing, that he admits the truth of the whole or any part of the case of any other party (Order 32,

r. 1). But statements made by a party suing or being sued in a representative character, in order to be admissible, must have been made while the person was clothed with such character (T. s. 755; R. N. P. 69; *Legge v. Edmonds*, 1856, 25 L. J. Ch. 125; see below (4)). So that a statement made by a trustee before his appointment is not evidence (*Fenwick v. Thornton*, 1827, Moo. & M. 51; *contra*, *Smith v. Morgan*, 1839, 2 Moo. & R. 257). A guardian cannot make admissions on behalf of an infant party (T. s. 555; *Byrne v. Byrne*, 1880, 5 L. R. Ir. Ch. 134; *Willis v. Willis*, 1889, 38 W. R. 7). Persons who are not parties, but the persons beneficially interested in the subject-matter of the claim, may make admissions which are relevant as against the claimant (T. s. 756; *Welstead v. Levy*, 1831, 1 Moo. & R. 138). Thus the statements of a shipowner may be proved against the master who is suing on behalf of the owner (*Smith v. Lyon*, 1813, 3 Camp. 465, 14 R. R. 810). But in order to make the admissions of a *cestui-que trust* relevant against the trustee, it must be shown that he is solely interested (*May v. Taylor*, 1843, 6 Man. & G. 261; *Doe v. Wainwright*, 1838, 8 Ad. & E. 691, R. N. P. 67). Joint contractors, for instance partners, may make admissions on behalf of each other (T. s. 743; R. N. P. 71; *Whitcombe v. Whiting*, 1781, 2 Doug. 652) during the continuance of their joint interest (T. s. 751), and their admissions can be given in evidence against any of them who is a party so soon as independent proof of the joint interest has been adduced to the satisfaction of the judge (*Nichols v. Dowding*, 1815, 1 Stark. 81; 18 R. R. 746); but mere co-owners may not (*Jagers v. Binnings*, 1815, 1 Stark. 64; 18 R. R. 746); nor co-trustees, where they are not personally liable (*Davies v. Ridge*, 1802, 3 Esp. 101; 6 R. R. 817); nor co-executors, unless (but *quære*) in their character as executors (*Fox v. Waters*, 1840, 12 Ad. & E. 43; *Scholey v. Walton*, 1844, 12 Mee. & W. 510); nor co-defendants in tort (*Daniels v. Potter*, 1830, Moo. & M. 501; T. s. 751)—unless the admissions go to prove a common motive (R. N. P. 68, *per* Ellenborough, L. C. J., in *R. v. Hardwick*, 1809, 11 East, p. 585). But admissions by one joint contractor are not available to take the debt out of the Statutes of Limitation as against another (Lord Tenterden's Act, 9 Geo. IV. c. 14, ss. 1, 2; Mercantile Law Amendment Act, 1856, ss. 13, 14). The admissions of a party's predecessor in title to the interest he claims in the subject-matter, made during the continuance of such predecessor's right, are evidence against the party (T. s. 787-792), because they tend to qualify the title passed (see the judgment of Parke, B., in *Coole v. Braham*, 1848, 3 Ex. Rep. 183). Thus the admissions of the assignor, before assignment, are receivable against the assignee (S. C.; *Welstead v. Levy*, 1831, 1 Moo. & R. 139); of his testator against the executor (*Smith v. Smith*, 1836, 3 Bing. N. C. 29); and of a landlord, before letting, against his tenant (*Crease v. Barrett*, 1835, 1 C. M. & R. 919; *Doe v. Seaton*, 1834, 2 Ad. & E. 178). The most important class of relevant admissions made on behalf of a party are those made by his agent. The question is always, not whether any relationship of principal and agent exists, but whether the person who actually makes the admission has authority to make admissions in regard to the subject-matter (R. N. P. 69; T. s. 602 *et seq.*); and independent evidence of such authority must be given to the satisfaction of the judge before the admission is relevant. If the authority is express, as if the party has referred to the alleged agent for the information given by him (*Daniel v. Pitt*, 1806, 1 Camp. 366 n.; 10 R. R. 706 n.; R. N. P. 69; T. s. 760); or if the party has vouched the admission, as by using an affidavit in which it appears in the proceedings (*Brickell v. Hulse*, 1837, 7 Ad. & E. 456; T. s. 763)—there is no difficulty. But express authority or ratification is

not usually to be looked for, and the authority to make the admission in question is usually inferred from the fact that the party has intrusted the conduct of his affairs in relation to the matter to the person who actually makes the admission, in such manner that the latter can reasonably be deemed to know the truth of the information he gives, and to speak or act on the party's behalf (see *Fairlie v. Hastings*, 1804, 10 Ves. 123, and *Langhorn v. Allnutt*, 1812, 4 Taun. 511; 13 R. R. 663). A great number of examples are collected in R. N. P. 67-71. A wife, as such, has no authority to make admissions on behalf of her husband, except as regards domestic matters usually left to a wife (*Anon.*, 1722, Stra. 527), or matters given into her care. Thus a wife left in charge of a shop can make admissions as to the payment for goods bought (*Clifford v. Burton*, 1823, 1 Bing. 199; 25 R. R. 614), but not as to the terms of tenancy (*Meredith v. Footner*, 1843, Mee. & W. 202). A report made by an agent to his principal is not evidence against the principal (*Langhorn v. Allnutt*, *supra*; *In re Devala Co.*, 1883, 22 Ch. D. 593). A solicitor has authority, for the purposes of a cause, to make admissions which are not only evidence against his client, but are conclusive against him (T. s. 772; *Young v. Wright*, 1807, 1 Camp. 139; *Butler v. Knight*, 1867, 2 Ex. Rep. 109); and so has a barrister while engaged in the conduct of the cause (*Stracy v. Blake*, 1836, 1 Mee. & W. 168); but a statement in casual conversation by either is not a relevant admission (*Petch v. Lyon*, 1846, 9 Q. B. 147).

4. *When made.*—It is a general rule that, where an admission is admissible against a party because it has been made on his behalf by reason of some relation between himself and the person actually making it, it must have been made while the qualifying relation existed (S. art. 16; T. ss. 751, 755, 794; and see as to a nominal party, above (3)).

5. *The whole Admission.*, including any statements, entries, or documents incorporated by reference, must be taken and put in evidence together. For instance, the whole of a conversation, so far as relates to the particular matter (*Smith v. Blandy*, 1825, Ry. & M. 257), and both sides of an account (*Rose v. Savory*, 1835, 2 Bing. N. C. 145); but not unconnected statements (*Prince v. Samo*, 1838, 7 Ad. & E. 627), or distinct entries in a book (*Catt v. Howard*, 1820, 3 Stark. N. P. 3; 23 R. R. 751), or unconnected letters in a correspondence (*Sturge v. Buchanan*, 1839, 10 Ad. & E. 598). An answer or part of an answer to any interrogatory may be used alone against the deponent, unless the judge is of opinion that any other answers are so connected with the answer, or part, in question, that they ought to be put in with it (Order 31, r. 24; *Lyell v. Kennedy*, 1884, 27 Ch. D. 1).

6. *Conclusive Admissions.*—The question of relevancy is often confused with that of the weight and effect of the evidence when adduced. In general, admissions are not conclusive of the truth of the matters stated. They may be shown to have been due to mistake (*Lee v. Lancashire and Yorkshire Rwy. Co.*, 1871, L. R. 6 Ch. 527,—a receipt in full discharge. See also ACCORD AND SATISFACTION); or to be untrue, even though made upon oath by the party himself (*Thornes v. White*, 1835, Tyrw. & G. 101; T. s. 857). On principle, it would seem that a party can only be barred from setting up the actual truth by an ESTOPPEL (*q.v.*), as by a receipt under seal, or by a contractual warranty of the truth of the statement sought to be contradicted. The necessities of practice, however, require that admissions made for the purposes of a cause, as by the pleadings (R. N. P. 77), in answer to notice to admit, by payment into Court (see above, A (2)), or by counsel or solicitors in the conduct of the cause (see above, B (3)), should be conclusive so long as they stand, but the Court or judge has a general power to

amend defects or errors in the conduct of proceedings (Order 28; and see r. 12), and may allow any such admission to be withdrawn (*Hollis v. Burton* [1892], 3 Ch. 226; see also Order 32, r. 4).

See ADMISSION IN CRIMINAL CASES.

Admittance to Copyhold.—See COPYHOLD.

Admonition.—See MONITION.

Admortisation.—The alienation of lands or tenements in mortmain. See MORTMAIN.

Adoption.—See CONTRACTS (RATIFICATION); PARTNERSHIP (RATIFICATION).

Adoptive Act.—An Adoptive Act is an Act, the application of which, within certain defined limits, depends on its adoption by some public body, or by a defined number of voters. For instance, under the Public Libraries Act, 1892, on the adoption of the Act by the majority of voters in a library district, the library authority is empowered to provide and maintain public libraries.

The expression, “the Adoptive Acts,” is used in the Local Government Act, 1894, s. 7 (1), with reference to certain Acts which the parish meeting has power to adopt. The Adoptive Acts named are: The Lighting and Watching Act, 1833; the Baths and Washhouses Acts, 1846 to 1882; the Burial Acts, 1852 to 1885; the Public Improvements Act, 1860; the Public Libraries Act, 1892. Other instances of Adoptive Acts are the Infectious Diseases Notification Act, 1889; the Public Health Acts Amendment Act, 1890; the Museums and Gymnasiums Act, 1891; and the Private Street Works Act, 1892.

Adoration of Sacraments.—See COMMUNION.

Ad quod damnum.—A writ which issued to the Sheriff or Escheator of a county before a grant by the king of a liberty franchise or licence relating to property within his bailiwick (*q.v.*). It directed him to inquire whether the proposed grant would be detrimental to the king or others. Formerly no licence to alienate land in mortmain was given until a return *ad damnum nullius* was made. Such an alienation was considered as likely to be detrimental to the country, because it might leave the alienor with insufficient land to qualify him to serve on juries, or to hold onerous offices. The writ fell into disuse chiefly owing to the introduction of the words *Et hoc damus . . . absque aliquo breve ad quod damnum*, and other expressions of the same import, into instruments of grant. It was last used for obtaining licence to change or enclose a highway; but the Act 13 Geo. III. c. 78, s. 19, and subsequent statutes, provided other and more convenient methods of procedure for this purpose. Forms of this

writ, which varied considerably, according to the circumstances of the case, are given in *Registrum Omnium Brevium*, ed. 1595, p. 247.

Ad referendum, a term used in diplomatic negotiations where the instructions do not cover a point involved, and meaning that the agent will reply upon it after reference to his government or sovereign.

Ad terminum qui preterit.—A writ of entry for a reversioner when possession had been withheld from him by a tenant for a term of years or for a life or lives, or by any person deriving title under him after the expiration of the term. It might be brought in the *per*; in the *per* and the *cui*; or in the *post*. This writ, which is found on the earliest English Plea Rolls, was abolished by the Real Property Limitation Act, 1833.

Adulteration is the mixing with any substance intended for sale any ingredient injurious to health, or which makes the nature or quality of such substance other than that for which it is to be sold or passed (see Cripps-Day on *Adulteration*, 1894).

1. The old common-law remedies for adulteration were many and curious (see Hawk., P. C., bk. i. c. 80), but are wholly obsolete. Where, however, food is sold with knowledge that it is dangerous for human food, the seller may be indicted (East, P. C., c. xviii. s. 4, p. 821; *R. v. Dixon*, 1814, 3 M. & S. 11; 15 R. R. 381).

2. Where the result of adulteration is to make the description of the adulterated article as that for which it is sold substantially false, the buyer's civil remedies are under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). See SALE OF GOODS.

3. Where the discrepancy between the description and the truth is so great as to amount to a deliberately false pretence, the seller is indictable under 24 & 25 Vict. c. 96, s. 88, or for a common-law cheat (*R. v. Goss*, 1860, 29 L. J. M. C. 90 (*cheese*); *R. v. Foster*, 1877, 2 Q. B. D. 301 (*tea*). But a mere puffing statement, or even a misrepresentation as to quality, is not indictable (*R. v. Bryan*, 1856, 26 L. J. M. C. 84). Many forms of adulteration are dealt with by statute, in the interests of the public health and revenue, and fair and honest dealing (see as to these Acts, Parl. Pap., 1896, c. 288).

4. *Food and Drugs generally*.—The Sale of Food and Drugs Acts, 1875 and 1879 (38 & 39 Vict. c. 63; 42 & 43 Vict. c. 29), and the Margarine Act, 1887 (50 & 51 Vict. c. 29), form the code in general use for summarily dealing with adulteration of all foods and drinks for man, and of drugs or medicines. They do not extend to articles like baking powder or yeast, which are not food though used in preparing food (*James v. Jones* [1894], 1 Q. B. 304); nor do they interfere with other civil or criminal remedies (38 & 39 Vict. c. 63, s. 28).

They prohibit—(a) Mixing or colouring, staining or powdering with any ingredient or material which will render an article of food injurious to health (38 & 39 Vict. c. 63, s. 3), or injure the quality or potency of a drug (s. 4), with intent that the substance should be sold as adulterated; (b) Sale of food or drugs so adulterated, unless the seller proves that he did not know, and could not with reasonable care have discovered, the adulteration (ss. 3,

4, 5); (c) Sale to the prejudice of the purchaser, even if he buys only for analysis, of any food or drug not of the nature, substance, and quality demanded, whether the difference arises from adulteration or not (38 & 39 Vict. c. 63, s. 6; 42 & 43 Vict. c. 30, s. 2; *Knight v. Bowers*, 1885, 14 Q. B. D. 845). Adulteration of spirits with water is within the section only if it exceeds the limit permitted by 42 & 43 Vict. c. 30, s. 6; (d) Sale of a compound article of food or compounded drug, not composed of ingredients in accordance with the demand of the purchaser (s. 7)—this appears mainly to affect chemists making up prescriptions; (e) Abstraction from any article of food of any part of it, so as to affect injuriously its quality, substance, or nature, with intent to sell the article in its altered state, and sale of the article so altered without disclosure of the alteration (s. 9)—this relates especially to milk; as to its effect see *Spiers v. Bennett* [1896], 1 Q. B. 65; (f) Wilfully misapplying a warranty or certificate given in respect of a food or drug, other than that to which it is applied (s. 27); (g) Giving a false warranty in writing by the seller to the purchaser of a food or drug, whether the seller is selling as principal or agent (s. 27); (h) Wilfully giving a label falsely describing the article sold (s. 27).

Offences (a) (b) are punishable, on summary conviction for a first offence, by fine not exceeding £50, and for subsequent offences on indictment for misdemeanour, by imprisonment not exceeding six months with hard labour (38 & 39 Vict. c. 63, ss. 3, 4). Offences (c)–(h) are punishable on summary conviction by fine not exceeding £20, with imprisonment in default of payment. Prosecution must be within a reasonable time, not exceeding six months, or, in the case of perishable articles, twenty-eight days from purchase (42 & 43 Vict. c. 30, s. 10; *Dixon v. Wells*, 1890, 25 Q. B. D. 249). The latter limit does not apply to a prosecution for false warranty within s. 27 (*Cook v. White* [1896], 1 Q. B. 284). The summons should state the particulars of the offence, but their omission is not fatal (*Neal v. Devenish* [1894], 1 Q. B. 544). The accused and his wife are competent witnesses (*ibid.* s. 21), and an appeal lies to Quarter Sessions from any summary conviction (s. 23). Penalties recovered in the case of prosecutions by officers of local authorities are paid into the common fund of the local authority (s. 26; *R. v. Titterton* [1895], 2 Q. B. 61). The absence of *mens rea* is no defence, except where the word “wilfully” is used (*Betts v. Armistead*, 1888, 20 Q. B. D. 77; *Spiers v. Bennett* [1896], 1 Q. B. 65; *Dyke v. Gower* [1892], 1 Q. B. 220), but a master seems not to be liable for sale by a servant in violation of express orders (*Kearley v. Tonge*, 1891, 60 L. J. M. C. 159; *Brown v. Foot*, 1892, 61 L. J. M. C. 110; *Commissioners of Police v. Cartman* [1896], 1 Q. B. 655).

The following defences and excuses are allowed:—

1. That the article sold was purchased upon an express written warranty that it was of the nature, substance, and quality for which it was resold, and was resold in the same state as it was in when purchased, and that the seller had no reason to believe it to be other than that for which he sold it (38 & 39 Vict. c. 63, s. 25; *Hotchin v. Hindmarsh* [1891], 2 Q. B. 181; *Laidlaw v. Wilson* [1894], 1 Q. B. 74; *Lindsay v. Rook*, 1894, 63 L. J. M. 231). The warrant must relate specifically to the bulk for which the adulterated article was taken (*Harris v. May*, 1884, 12 Q. B. D. 97; *Farmer's Co. v. Stevenson*, 1891, 60 L. J. M. C. 70).

To escape liability for costs, the defendant must before the hearing give notice of his intention to rely on this defence.

2. That the food or drug is unavoidably mixed with extraneous matter

in the course of collection or preparation, or contains ingredients not injurious to health, added for its production or preparation as an article of commerce in a state fit for carriage or consumption, and not fraudulently to increase bulk, weight, or measure, or to conceal inferior quality (38 & 39 Vict. c. 63, s. 6).

3. That the food or drug is a proprietary medicine, or the subject of a patent in force, and is supplied in the state required by the specification of the patent (s. 6).

4. That if compound, and not fraudulently or injuriously mixed, it was sold with a label stating that it is mixed (s. 8; *Jones v. Jones*, 1894, 58 J. P. 653). Where an article is proved to be mixed, the burden of proof of any exception is thrown on the defence (s. 29).

Local authorities, *i.e.* town and district councils, may, and, on the request of the Local Government Board, must, appoint competent analysts, who only report quarterly to the local authority (38 & 39 Vict. c. 63, ss. 10, 19). (See ANALYSIS.) Medical or other municipal officers, under the direction of the local authority, may purchase for analysis at the cost of the rates (s. 13). Samples of margarine can be taken without purchase (50 & 51 Vict. c. 29, s. 10). In the case of milk, the officer can take a sample of milk at the place of delivery to the purchaser or consignee, in pursuance of a contract for sale to him (42 & 43 Vict. c. 30, s. 3), *i.e.* the place where the purchaser takes possession, not that where the property passes (*Filshie v. Erington* [1892], 2 Q. B. 200). But the place of delivery must be within the district for which the officer is appointed (*R. v. Smith* [1896], 1 Q. B. 596). The taking of each sample is a separate transaction (*Fecitt v. Walsh* [1891], 2 Q. B. 304). Refusal to sell to the officer entails a penalty, if the article is exposed for sale in any shop, stores, street, or place of public resort, or is in course of delivery (38 & 39 Vict. c. 63, s. 17; 42 & 43 Vict. c. 30, s. 4). When purchase is made by any person for analysis, notice of intention to have the article bought analysed must forthwith be given to the seller, and offer made to divide the sample into three parts, one to be retained by the seller if he wishes (s. 14), or into two parts, if the seller does not (s. 15). These provisions do not apply to samples of milk taken in course of delivery (*Rolfe v. Thompson* [1892], 2 Q. B. 196), but apply to margarine (50 & 51 Vict. c. 29, s. 10), and are peremptory (*Smart v. Watts* [1895], 1 Q. B. 219). One part is retained for future comparison, and one submitted to the analyst, or, if he lives over two miles away, sent to him by registered parcel (38 & 39 Vict. c. 63, s. 16; 54 & 55 Vict. c. 46, s. 11).

The certificate must follow the prescribed form (38 & 39 Vict. c. 63, s. 18); to be valid, must state the constituent parts of the sample analysed, and the result of the analysis (*Fortune v. Hanson* [1896], 1 Q. B. 202; *Bridge v. Howard*, 1896, 31 L. Jo. 601), and the facts which are the result of the analysis, and such information as will enable the justice to form an opinion (*Newby v. Sims* [1894], 1 Q. B. 478). These decisions cause great difficulty in the case of milk, where the thing said to be added is one of the constituents of the article analysed. Observations outside this should not be added, but are not fatal to the validity of the certificate (*Bakewell v. Davis* [1894], 1 Q. B. 296). The certificate is sufficient but not conclusive evidence of the matters therein stated (*Hewitt v. Taylor* [1896], 1 Q. B. 287), as it may be corroborated by the evidence of the defendant himself, by insisting on the attendance of the analyst for cross-examination, or request to the justices to have samples analysed at Somerset House (38 & 39 Vict. c. 63, s. 21).

All factories for margarine and substances prepared in imitation of

butter must be registered (50 & 51 Vict. c. 29, s. 9). Margarine, whether imported or home-made, must be consigned as such, and is to be examined by the customs authorities or officers of local authorities, in transit, and samples taken for analysis (s. 8). All packages are to be marked Margarine, as must each parcel exposed for sale, *i.e.* placed in view or sight of prospective purchasers (*Wheat v. Brown* [1892], 1 Q. B. 418; *Moore v. Pearce* [1895], 2 Q. B. 657). Breach of provisions of the Act entails a summary penalty of £20 for a first, £50 for a second, and £100 for a third or subsequent offence (s. 4), unless the accused can show that he bought the substance as butter with a written warranty (s. 7). An innocent employer can screen himself by bringing the real offender before the Court (s. 5; *Brown v. Foot*, 1894, 61 L. J. M. C. 110).

5. As to other provisions against adulteration, see BEER; BREAD; COFFEE; HOPS; MANURES AND CATTLE FOOD; MERCHANDISE MARKS; SEEDS (AGRICULTURAL); TEA; TOBACCO AND SNUFF.

Adultery.—The offence of incontinence by married persons.—This offence is not punishable by our law as a crime. Although during the Commonwealth it was enacted that adultery should be adjudged felony, and every person, as well the man as the woman, offending therein, should suffer death without benefit of clergy (*q.v.*), this enactment ceased at the Restoration. Prior to the Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, s. 33, the adultery of either spouse entitled the innocent party to a divorce *a mensa et thoro*, by suit in the Ecclesiastical Court, and a husband could maintain an action for criminal conversation against a person who had illicit connection with his wife. The damages recoverable in this action were properly increased or diminished by the particular circumstances of each case—as, the rank and quality of the plaintiff, the condition of the defendant, his being a friend, relation, or dependent of the plaintiff, or being a man of substance. The nature of the seduction, the previous character of the wife, and the husband's treatment of her, were all proper circumstances to be taken into account (Bull. N. P. 26, *b*). By sec. 59 of the Act of 1857, actions of criminal conversation were abolished, and a substitute provided by sec. 33, which enacted that any husband might, either in a petition for dissolution of marriage, or for judicial separation, or in a petition limited to such object only, claim damages from any person, on the ground of his having committed adultery with the wife of the petitioner. The remedy of limiting the petition to a claim for damages has not been largely resorted to. In the assessment of damages the same principles are to be applied as would have been in an action of criminal conversation; the means of the co-respondent, however, are not to be taken into account; the co-respondent is not to be punished, but the husband is to be compensated, and his own conduct considered (*Keyse v. Keyse*, 1886, 11 P. D. 100).

For the provisions of the Act relating to divorce and separation, by reason of adultery, see the article DIVORCE. Even prior to the Act, divorce *a vinculo*, for adultery, was frequently granted to the husband by a private Act of Parliament. Under the Statute of Westminster, 13 Edw. I., stat. i. c. 34, a wife forfeits her dower by reason of her adultery; but the adultery of the husband does not deprive him of his estate by curtesy, and there is no equity to prevent his asserting his right in such a case (*Sidney v. Sidney*, 1734, 3 P. Wms. 276). Where a wife commits adultery, the husband's liability for necessities ceases (*Atkyns v. Pearce*, 1849, 2 C. B. N. S. 763). If a wife commits adultery, her husband's obligation to support her ceases, unless he con-

done the offence. Accordingly, he cannot be convicted under the Vagrancy Act, for wilfully refusing to maintain her, if she has been unfaithful after she left him, and though he may have himself committed adultery (*R. v. Flintan*, 1838, 1 Barn. & Ad. 227). Similarly, an order for parish relief cannot be made against a husband under the Poor Law Amendment Act, 1868, if the wife has been unfaithful, and the offence has not been condoned. See DIVORCE.

Advanced Members.—See BUILDING SOCIETIES.

Advancement.—The doctrine of equity expressed in the word advancement arises as a counter presumption to that of a resulting trust in cases where a purchaser takes the conveyance or transfer in the name of another. As to resulting trust, see *sub nom. infra*. The circumstances of one or more of the nominees being a child or children of the purchaser operates to rebut the resulting trust which the law would otherwise imply in favour of such purchaser; the reason being, that there arises the presumption of intention on the part of such purchaser to make provision for such child or children, which ousts or rebuts the general presumption, and in consequence the child takes the property beneficially, and not as trustee for the purchaser. Thus, in the case of *Dyer v. Dyer*, 1788, 2 Cox 92, 2 R. R. 14, a father purchased copyhold premises, but they were granted to him, to his wife, and to his son William in succession for their lives, and the longest liver of them. The father having survived his wife, devised them to another son; but although the whole purchase money had been paid by the father, yet the son William was held entitled to them beneficially as trustee.

"In every case," says Sir W. P. Wood, "in which anyone asserts that another, in whom it is admitted that the legal estate in any lands is vested, was a trustee for him, the onus lies on him to make good his position; that onus is, however, sufficiently satisfied by the claimant showing that he had the purchase-money, and thereupon the onus is shifted to the other party, who has to show some ground for calling upon the Court to hold that the purchase enured for his benefit, and not merely for the benefit of the person who paid the purchase-money. Again, the fact that the owner of the legal estate is the child of the purchaser is conclusive on his father, unless the presumption of advancement which arises thereupon is rebutted by evidence of contemporaneous acts or declarations" (*Tucker v. Burrow*, 1865, 2 Hem. & M. 524).

The doctrine has been placed upon various grounds, as upon the probability arising from the natural love and affection of a parent for his child, and upon his moral obligation to provide for his child according to his means. This latter ground would appear to be the true one, and therefore it was held in *Bennet v. Bennet*, 1879, L. R. 10 Ch. D. 474, following *In re De Visme*, 1863, 2 De G., J. & S. 17, which was the case of a mother living apart from her husband, that the presumption does not arise as between a widowed mother and her child, as the mother is in equity under no moral obligation to provide for it.

It makes no difference whether the purchase is taken in the sole name of the child, or in the joint names of the father and child, with or without other persons, and it arises equally in the case of a son or daughter. Doubts were formerly entertained whether the presumption arose where the child was already well provided for; but, as was said in *Dyer v. Dyer* (*supra*),

"this distinction is not very solidly taken, as the rule in equity is that the father is the only judge as to the question of a son's provision." The present rule may be stated, that the mere fact of ample provision having been made for a child will not of itself prevent the presumption of advancement, although it may be used as a matter of evidence against the presumption. The presumption of advancement may arise not only where the case is one of father and child, but also where one who has placed himself *in loco parentis* is the purchaser. The cases in which the purchaser has been regarded as standing *in loco parentis* have usually been where he stood in legal or natural relationship towards the nominee, as in the case of an illegitimate son (*Elvand v. Dancer*, 1680, 2 Ch. Cas. 26), a grandson whose father was dead (*Soar v. Foster*, 1858, 4 Kay & J. 152), a wife's adopted nephew (*Currant v. Jago*, 1854, 1 Col. C. C. 261), possibly in the case of a godson (*Standing v. Bourning*, 1885, 27 Ch. D. 341; 31 Ch. D. 282). Although, after some conflict of opinion, it would appear that the presumption does not arise *ipso facto* in the case of a widowed mother and her son (*Bennett v. Bennett*, *supra*), though in such a case very little evidence beyond the relationship would appear to be wanted to prove the intention to make a gift, and it will not require to show that a mother has put herself *in loco parentis* for such purpose. In *Re De Visme* (*supra*), a case in which it was decided that there was no presumption of advancement in the case of a purchase by a married woman living apart from her husband from her separate estate in the name of her child, the decision went upon the ground of her being under no legal liability to support her child. Since that case, the Married Women's Property Act, 1882, s. 21, has cast this duty upon a married woman where she has separate property, and thus in cases under that Act the ground of the decision seems gone. Nevertheless, if no presumption of advancement towards her child arises in the case of a woman who is a widow, it would seem *à fortiori* not to arise where the mother is still a wife. The presumption of advancement has been made in the case of a father who was considered as standing *in loco parentis* towards his illegitimate son, but it was not made in the case of a grandfather who appeared to be *in loco parentis* towards the illegitimate son of his son (*Tucker v. Barrow*, 1865, 2 Hem. & M. 515, 527). Still less would it appear to arise in the case of a purchaser apparently standing *in loco parentis* towards a mere stranger.

As to what constitutes being *in loco parentis*, the definitions are usually taken from cases of ademption of legacies, or satisfaction of portions, and such definitions would seem applicable here. It has been said by Sir W. Grant (19 Ves. 412), that such a state of things exists where "a person assumes the parental character or discharges the parental duties"; but if this definition is accepted, it must be considered with reference to the purchaser's intention rather than to his acts (*Ex parte Pye*, 18 Ves. 140; 11 R. R. 173; *Powys v. Mansfield*, 1837, 3 Myl. & Cr. 367). On this subject, James, L. J., in *Furkes v. Pascoe*, 1875, L. R. 10 Ch. 350, observes: "What in any particular case is putting oneself *in loco parentis* is one of the most difficult of legal problems to solve. It used to be laid down in treatises that nothing short of assuming the whole functions and duties of the father would do, and, in particular, that such a character could not be predicated where the child was actually living with her own father and maintained by him, and could not be predicated even between a grandfather and grandson if the father were alive. But in the case of *Pym v. Lockyer*, 1840, 5 Myl. & Cr. 29, before Lord Cottenham, that rule was certainly not acted upon to its full extent. In that case the grandfather had directed and controlled the children, had been referred to on the treaties for their marriages,

and had provided marriage portions for them. Nothing of the kind took place in this case. There are very strong expressions about adoption proved by the defendant (the son of a daughter-in-law, who was the nominee) himself, but it does not appear that Mrs. Baker (the purchaser) ever did provide, or had occasion to provide, for the maintenance, education, marriage portions, or setting out in the world of the children of her daughter-in-law, except that the son did live with her a few years before her marriage, and had a handsome present on his marriage." This and other cases show that adoption is not of itself sufficient to prove cases of standing *in loco parentis*.

The doctrine of advancement has been extended to the analogous case of husband and wife. The ground of the presumption in these cases has been put upon the fact that the wife cannot be a trustee for her husband, also upon the ground of natural affection; but there is little authority as to the doctrine (*Soar v. Foster*, 1858, 4 Kay & J. 160). The presumption does not arise where the purchaser is merely cohabiting with a woman as his wife, as with his deceased wife's sister (*ibid.*). The doctrine of advancement applies as well to personal as to real estate, and to the case of a voluntary transfer of personal estate (as in the case of stocks and shares), if a resulting trust would otherwise arise (*Batstone v. Salter*, 1875, L. R. 10 Ch. 431).

Parol evidence is admissible to show that the purchaser stands *in loco parentis* towards the nominee, and also to show his intention to confer a benefit by way of advancement or bounty, notwithstanding the Statute of Frauds, upon the ground that such evidence is not used to establish a trust, but to rebut one which would otherwise arise by implication of law. Thus, the contemporaneous acts and statements of the purchaser, and of his nominee, if the latter takes part in the purchase, may be given in evidence to negative the presumption of resulting trust, and support that of advancement (*Sidmouth v. Sidmouth*, 1840, 2 Beav. 447). Conversely, parol evidence is admissible to rebut the presumption of advancement, and let in the resulting trust (*Williams v. Williams*, 1863, 32 Beav. 370). "For, although a purchase in the name of a wife or child, if altogether unexplained, will be deemed a gift, yet you may take the surrounding circumstances into consideration, so as to say it is a trust and not a gift" (Jessel, M. R., in *Marshall v. Crutwell*, 1875, L. R. 20 Eq. 328). The fact of the purchaser keeping possession of the property and treating it as his own, at the time of the purchase, may be some evidence of his intention not to advance, and under certain circumstances might be sufficient to rebut the presumption (*Stock v. M' Avery*, 1872, L. R. 15 Eq. 55), yet is not usually considered sufficient of itself.

But although acts and declarations of the purchaser, subsequent to the purchase, are not admitted in his favour to negative the presumption of advancement, it would seem that they will be admitted to support it. And the subsequent acts and declarations of the child may be used to rebut that presumption (*Standing v. Bowring*, 1884, 27 Ch. D. 345).

In a case in which the son was a solicitor, and acted as such for his mother in the matter, his professional position was held to rebut the presumption of advancement, which would not otherwise have arisen (*Garrett v. Wilkinson*, 1848, 2 De G. & Sm. 244). The presumption of advancement being entirely one as to the intention of the purchaser, and thus liable to be itself rebutted or supported by parol evidence, in cases where such evidence exists, as where the parties to the transaction are both alive, the position becomes similar to what occurs in cases when it is a question of gifts and bounty between two strangers in blood. •

Advancement of Trial.—In order that a cause may be brought to a more speedy trial than if taken according to its position in the list or paper, some good reason for urgency must be shown. Defendants have no right to object to a cause being heard at any time after it has been set down for hearing, but neither ought one plaintiff to be preferred to another, unless the Court is of opinion that some special ground exists. Where the Crown is a party, however, the Court, on the application of the law officers, will take their cases in the order they suggest. By the 9th Resolution of the judges of the Queen's Bench Division in 1894, any cause in any list for trial may be marked urgent, or fixed for a day certain, on special grounds. By the 13th Resolution, any application to mark urgent a cause not in the week's list is to be made to the judge in chambers; and if in the week's list, to the senior judge sitting at Nisi Prius. There is a similar arrangement in regard to the list for commercial causes. See COMMERCIAL CAUSES; COMMERCIAL COURT.

As to the Chancery Division, see Daniell's *Chancery Practice*, 6th ed., vol. i. pp. 685, 686.

By Order 50, r. 1A, R. S. C., 1883, where an application is made before trial for an injunction or other order, an "early trial" may be ordered without going into the merits on the application; and this may be at the next or other assizes for any place, if convenient (see *Rob v. Rob*, 1887, 31 Sol. J. 494; and *Keenan v. Clarke*, 1885, 29 Sol. J. 67). In Admiralty actions (*q.v.*), Order 64, r. 9, provides for appointment, on summons or motion, of an early day for trial, without notice of trial, and with curtailment of time for taking other steps in an action.

In the Court of Appeal, an application to advance the hearing, where the maintenance of certain infants was concerned, was refused (*Mellor v. Swire*, 1884, 29 Sol. J. 8).

But in *Lazenby v. White*, 1870, 6 Ch. 89, an appeal from an injunction to restrain the use of a trade mark was advanced, on the ground that the continuance of the injunction, if wrongly granted, would cause irreparable injury.

Adventure.—See PARTNERSHIP.

Adventure, Bill of.—This is said to be a writing signed by a merchant ship owner or master, to the effect that goods shipped on board the vessel in his name really belong to, and are at the risk of, another person, to whom he has made himself responsible for the produce. There is a similar phrase to this in French maritime law, *Bill of Gross Adventure*, but this is an instrument making a loan on maritime security, like bottomry. Bills of adventure are apparently now obsolete.

[Bonner, *Dict.* (U.S. 1884); Wharton, *Dict.* (1892).]

Adverse Possession.—In a popular sense there is adverse possession of land when the land is held under a claim of title inconsistent with that of the true owner, and until 1833 this in general coincided with the technical legal meaning of the term. The chief effect of adverse possession was to make the Statute of Limitations run against the true owner, and under the Limitation Act, 1623, 21 Jac. I. c. 16, a period of twenty years barred "his right of entry and consequently his right to bring

ejectment, though it did not extinguish his title (*Hunt v. Burn*, 1702, 2 Salk. 422). Hence adverse possession came in practice to denote possession held under such circumstances as would make the Statute run. For this purpose it was in strictness necessary that the adverse possession should have effected a disseisin of the true owner. The Statute of James ran from the time when the owner's "right or title" accrued, and these terms, according to their technical sense, implied that his estate must have been turned to a right of entry by disseisin or ouster (*Reading v. Royston*, 1702, 2 Salk. 423; 2 Preston on *Abstracts*, 357). Disseisin, however, was a highly technical matter (see judgment of Lord Mansfield in *Taylor v. Horde*, 1737, 1 Burr. 60; 2 Sm. L. C., 10th ed., p. 559), and latterly there was a tendency to adopt the more liberal view, that adverse possession for the purpose of the Statute was independent of disseisin, and that it was a question of fact whether or no the possession was inconsistent with that of the true owner (*Cholmondeley v. Clinton*, 1820, 2 Jac. & W. 164; 22 R. R. 845). Thus, where a person who came in under a lawful title held over after his title had expired, the tenancy at sufferance, thereupon created, prevented a disseisin (*Doe v. Perkins*, 1814, 3 M. & S. 271); nevertheless it was held in *Doe v. Gregory*, 1834, 2 Ad. & E. 14, that he had an adverse possession sufficient to attract the operation of the Statute. But even if a technical disseisin was not essential, it was necessary to examine in each case into the character of the possession, and it was not deemed to be adverse when it was taken with the permission of the true owner. Moreover, there were rules which saved it from being adverse in certain special cases. Possession held by a younger brother was deemed to be the possession of the heir, and one of several co-owners held on behalf of the rest, unless, on entering, he expressly claimed to hold on his own account.

Taking adverse possession in the secondary sense, as possession which makes the Statute run, its nature was completely altered by the Real Property Limitation Act, 1833, 3 & 4 Will. iv. c. 27. Under that Act and the Amending Act of 1874, 37 & 38 Vict. c. 57, the period of limitation still runs from the time when the owner's right of entry or action accrues, but instead of making the time of accrual depend upon the fact of adverse possession, specific rules are laid down for ascertaining the time in particular cases. It has thus become unnecessary to decide upon the correctness of the view taken in *Doe v. Gregory*, *supra*, and the specific rules just referred to as saving possession from being adverse are expressly abolished (Act of 1833, ss. 12, 13). Further, an owner is no longer safe in allowing possession of his land to be held by another without payment of rent. The occupier becomes tenant at will, and unless the tenancy is expressly renewed, or an acknowledgment of title given in writing, the Statute runs from the end of the first year of occupation (Act of 1833, s. 7). See ACKNOWLEDGMENT. Hence it was held, soon after the passing of the Act of 1833, that its effect had been to abolish the old doctrine of adverse possession (*Nepean v. Doe*, 1837, 2 Mee. & W. 911; *Culley v. Taylerson*, 1840, 11 Ad. & E. 1015), though the phrase "adverse possession" can still be conveniently used to denote a possession in favour of which the Statute is running (*Dean of Ely v. Bliss*, 1852, 2 De G., M. & G. 447). The chief rule under the existing law is that the Statute runs against the true owner from the time when he has been dispossessed or has discontinued possession (Act of 1833, s. 3), though, to constitute a discontinuance of possession, there must be an abandonment of possession by one person followed by the actual possession of another (*M'Donnell v. M'Kinty*, 1847, 10 Ir. L. R. 526;

Smith v. Lloyd, 1854, 9 Ex. Rep. 562); but the character of the new possession, whether intentionally adverse or not, is immaterial. The period in which the owner's right of entry or action will be barred is now, for ordinary cases, twelve years (Real Property Limitation Act, 1874, s. 1), and at the same time his title is extinguished (Act of 1833, s. 34), and a good title is vested in the possessor (*Doe v. Sumner*, 1845, 14 Mee. & W. 42; *Scott v. Niron*, 1843, 2 Con. & Law. 194; *Burroughs v. M'Creight*, 1844, 1 Jo. & Lat. 303).

Adverse Witnesses.—See EVIDENCE; WITNESS.

Advertisement as to Betting.—See BETTING.

Advertisement of Apology.—See APOLOGY.

Advertisement, Substituted Service by.—When it appears that from any cause prompt personal service of any writ of summons, writ, notice, pleading, summons, order, warrant, or other document of which personal service is required, cannot be effected, the Court or a judge may make an order for the substitution for service of notice by advertisement or otherwise (R. S. C., Order 9, r. 2, and Order 57, r. 6). See SUBSTITUTED SERVICE.

The application for an order for substituted service is made in the Chancery Division to a judge by summons *ex parte* (R. S. C., Order 55, r. 15), and in the Queen's Bench Division to a master *ex parte* (Order 55, r. 12).

The application must be by affidavit, showing that all reasonable efforts have been made to effect personal service, that prompt personal service is impossible, and that there is a reasonable probability of the advertisement coming to the knowledge of the party to be served. (For forms of affidavit, see *Chitty's Forms*, 12th ed., p. 87, and *Daniel's Chancery Forms*, 4th ed., p. 142). The order appears to be usually, that the writ should be advertised in the *London Gazette* and *Times* (see *Cook v. Dey*, 1876, 2 Ch. D. 218; 45 L. J. Ch. 611; 24 W. R. 362. For form of advertisement, see *Daniel's Chancery Forms*, 4th ed., p. 142).

In the County Courts, substituted service by advertisement of any summons, notice, proceeding, or document, other than a default summons, is allowed, where from the absence of any party, or any other sufficient cause, personal service cannot be effected. Application must be made to the judge or registrar by affidavit, showing grounds. The order must direct in what newspaper or newspapers the advertisement is to be inserted. (See County Court Rules, Order 52, rr. 6, 9, and 10a, and Forms 29, 30, and 31. A form of advertisement is given in the *Annual County Court Practice*, 1897, p. 913).

Advertisements before Action.—Advertisement for creditors under 22 & 23 Vict. c. 35, s. 29, does away with the necessity for advertisements in an administration suit (*Cuthbert v. Warmby*, W. N. 1869, 12).

Advertisements, Indecent.—By the 52 & 53 Vict. c. 18, ss. 3 & 4, no picture or printed or written matter of an obscene nature, and no indecent advertisement, may be exhibited to public view or placed so as to be visible to persons passing along a public highway or using a urinal, or given away or offered to such a person, or delivered to anyone for the purpose of being so exhibited. The phrase “indecent advertisement” is defined by s. 5 of the Act, while s. 6 authorises any constable to arrest without a warrant any person whom he may find committing any offence against the Act.

Advertisements of Queen Elizabeth.—Advertisements “for the due order in the publique administration of common prayers and using the holy sacramentes and for the apparel of all persons ecclesiasticall, by virtue of the queen majesties letters commanding the same, the 25th day of January in the seventh year of the raigne of our sovaigne lady Elizabeth.” These “Advertisements” were drawn up in 1564–65 by Matthew Parker, who was at that time Archbishop of Canterbury, and other bishops in commission with him, in obedience to peremptory letters addressed to them by Queen Elizabeth, that they should take steps for the establishment of religious uniformity, in view of the varieties at that time existing in religious observances in the Church of England. In obedience to these commands, the archbishop and some bishops proceeded to compile the articles, subsequently known as the “Advertisements.” The Queen’s Council, however, refused to confirm them; but the archbishop, according to Strype (*Strype’s Parker*, 314), thought it advisable to print and to publish them on their episcopal authority. “But because the book wanted the queen’s authority, they thought not fit to term the contents thereof Articles or Ordinances, by which name they at first went, but by a modester denomination, viz. Advertisements.” The Privy Council in 1877 (*Ridsdale v. Clifton*, L. R. 2 P. C. 276, at p. 311) stated that the word advertisements was a “word which, in the language of the time, was equivalent to admonitions or injunctions.” These advertisements were subsequently revised and altered, and, after being submitted to Cecil, the Secretary of State, were published in 1566. It seems possible that in some way the royal approval was indirectly given to them; but the queen apparently never gave an official sanction to them, but left them “to be enforced by the several bishops on the canonical obedience imposed upon the clergy and the persons conveyed to the ordinaries by the Act of Uniformity.” Strype (*Strype’s Parker*, vol. i. p. 319) considers that these Advertisements eventually became of force and recovered their first name of Articles and Ordinances. Later documents refer to them as authoritative, but quote them still as “Advertisements.” In modern times the question arose as to whether sec. 25 of the Act of Uniformity, 1 Eliz. c. 2, must be read together with the order made thereunder by the Advertisements, or, in other words, whether the directions in the Advertisements could be described as a “taking order” under the above section. A further question arose as to whether, having regard to the rubric note of the Prayer-Book of 1662, and the Act of Uniformity of 1662, 13 & 14 Car. II. c. 14, ss. 24 & 25, the Advertisements, assuming them to have attained legal authority, were not repealed as from 1662.

Under the Act of Uniformity, 1 Eliz. c. 2, s. 25, it was enacted “That such ornaments of the Church and of the ministers thereof shall be retained and be in use as was in this Church of England by authority of Parliament in the second year of King Edward VI., until such other order shall be

taken by the authority of the Queen's majesty, with the advice of her Commissioners appointed and authorised under the great seal of England for causes ecclesiastical or of the Metropolitan of this realm." See ORNAMENTS RUBRIC.

In *Elphinstone v. Purchas*, 1870, 3 Ad. & Ec. 66, the Court of Arches (Sir R. Phillimore) held that the issue of these Advertisements could not be considered as a taking of further order under the Act, 1 Eliz. c. 2, so as to make the vestments authorised under the first Prayer-Book illegal. This decision was reversed in *Hebbert v. Purchas*, 1870, L. R. 3 P. & D., 605, the Privy Council holding that the ornaments rubric, prefixed to the order for morning and evening prayer, must be construed with the Advertisements and the Act of Uniformity, 1662, 13 & 14 Car. II. c. 4, so as to make the use of such vestments illegal. In *Clifton v. Ridsdale*, 1877, 2 P. D. 276, when the question was again argued, the Privy Council again held that the Advertisements were a taking of order within the Act of Parliament by the queen with the advice of the Metropolitan, and that sec. 25 of the Act of Uniformity, 1662, must be read as if the order had been inserted therein. On this decision, Sir Walter Phillimore, *Ecclesiastical Law*, observes: "This decision was, however, by the majority only. It has been subjected to severe criticism. One of the members of the Privy Council, Lord Selborne, has taken the unusual course of writing a book to justify it, in answer to Mr. Parker, and the question cannot yet be considered as settled."

[*Authorities*.—Phillimore, *Ecclesiastical Law*, 2nd ed., vol. i. pp. 711-712. See also UNIFORMITY, ACTS OF; ORNAMENTS RUBRIC; Strype's *Parker*, *supra*; Cardwell's *Synodalia*, *supra*. See also authorities cited in the cases, *supra*.]

Advertising for Stolen Property.—A forfeiture of £50 is incurred by any person who prints or publishes any notice, publicly advertising a reward for the return of property stolen or lost, which contains words purporting that "no question will be asked," or that the person producing the property will not be arrested, or that persons who have bought or lent on the property will be repaid their loan or advance, or any reward for its return (24 & 25 Vict. c. 96, s. 102).

Such advertisement is an offer to compound a felony. The forfeiture is recoverable by action by a common informer, to be brought within six months; and cannot be brought against the printer or publisher of a newspaper, without first obtaining the written assent of the Attorney-General (24 & 25 Vict. c. 96, s. 102; 33 & 34 Vict. c. 65, s. 3). See COMPOUNDING FELONY.

Advertising Vehicles.—It is unlawful for the proprietor of a metropolitan stage or hackney carriage, to suffer any notice, advertisement, or printed bill, etc., to appear upon the outside or inside of such carriage, so as to obstruct the light or ventilation, or cause annoyance to any passengers.

It is unlawful for any person to carry about on any carriage, or on horseback, or on foot, in any thoroughfare or public place, within the limits of the London Hackney Carriage Act, 1853, to the obstruction or annoyance of the inhabitants or passengers, any picture, placard, notice, or advertisement, whether written, printed, or painted upon or posted or attached to any part of the carriage, or any board or otherwise (secs. 14 & 15 of the London Hackney Carriage Act, 1853, 16 & 17 Vict. c. 73).

Advice Note.—The effect of terms contained in an advice note, purporting to limit the liability of the sender, was considered in *Mitchell v. Lancashire and Yorkshire Railway Co.*, 1875, L. R. 10 Q. B. 256. The plaintiff was the consignee of flax sent by the defendants' railway to a certain station. On its arrival the defendant sent to the plaintiff an advice note of its arrival, requiring him to remove it, and stating that the defendants would hold it, "not as common carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges." After receipt of this notice, plaintiff went to the station and removed two tons of the flax, but left the rest at the station for more than two months. There was no warehouse at the station, and the flax remained on open ground, insufficiently covered, and became damaged by wet. It was held that, treating the advice note, acquiesced in by the plaintiff, as a contract, its terms did not exempt the defendants from liability for negligence, to the extent that they would be liable as warehousemen or bailees for hire. See BAILMENTS.

Advice of Court.—By Order 55, r. 3, of the Rules of the Supreme Court, executors and administrators, and any person claiming to be interested as creditor, devisee, legatee, next of kin, or heir-at-law of a deceased person, or as *cestui-que trust*, under any deed or instrument (either directly or by assignment), may apply by originating summons for the determination of any question arising in the administration of the estate or trust. This provision has practically superseded applications to the Court for advice by trustees, and other persons interested in trust-property, under Sir George Turner's Act (13 & 14 Vict. c. 35, repealed by the Statute Law Revision Act, 1883, 46 & 47 Vict. c. 49), or Lord St. Leonard's Act (22 & 23 Vict. c. 35, s. 30, repealed by the Trustee Act, 1893, 56 & 57 Vict. c. 53), which enabled such persons to obtain the advice and directions of the Court summarily, by special case or petition, and protected them in acting upon the advice or directions given. Both the Acts referred to have been repealed, but the power of stating a case under Sir George Turner's Act, and the provision contained in it (s. 15), protecting every executor, administrator, trustee, or other person, making any payment or doing any act in conformity with the declaration of the Court, are preserved by Order 34, r. 8 (*Foster v. Schlesinger*, 1886, 54 L. T. 51). A declaration or opinion of the Court upon originating summons under Order 55, appears to give an equally complete protection to persons acting upon it (see *per* Stirling, J., *In re Partington*, 1888, 57 L. T. 660), for the Court has the same jurisdiction upon the summons as if it were administering the trust in an action (*Conway v. Fenton*, 1888, 40 Ch. D. 512). No action or proceeding is now open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed, or not (Order 25, r. 5). But the judges commonly decline to express opinions or to make declarations where there is no necessity for or advantage in having an immediate determination of the question (see notes to Order 25, r. 5, in the *Annual Practice*).

As to the form of an originating summons, for the opinion of the Court, see Order 54, r. 4 b. The questions upon which an opinion is required should be stated categorically, and not in general terms only, such as "who is entitled" (*In re Harman* [1894], 3 Ch. 607). According to the practice in the Chancery Division, a fee to counsel for settling the summons is allowed on taxation.

Advice on Evidence.—It is customary in all actions in the High Court, after the pleadings have been closed, to lay the papers in the case before counsel, in order that he may advise upon the evidence necessary to support his client's case, and the steps necessary in order to prepare for the trial. Although the rules of evidence, and the practice according to which evidence is adduced have in modern times been considerably simplified, this step in litigation is still of great importance. It is rarely omitted and is always treated upon taxations of costs as necessary and proper. In framing the opinion, the case is first analysed in order to ascertain what are the issues involved, and then each issue in turn is considered, and the evidence to be adduced in support of the party's contention in regard to it, or in rebuttal of that of his opponent, is indicated. So far as the former operation is concerned, the matters dealt with are matters of substantive law, and assistance in regard to them is to be obtained from the ordinary text-books and digests. See the special articles throughout this work.

When the issues have been defined, it is often necessary to consider the right to begin at the trial (see *BEGIN, RIGHT TO*, and *BURDEN OF PROOF, q.v.*).

The modes of proof may be distinguished as proof by admissions, by witnesses, and by documents. The documents put in evidence must usually be themselves proved by witnesses to handwriting or otherwise, so that the division is not exhaustive. In some cases, moreover, presumptions of law, or presumptions of fact which the law makes in the absence of evidence to the contrary, avoid the necessity of proof. (See *PRESUMPTION.*) The most important mode of obtaining admissions is by interrogating the opposite party (see *INTERROGATORIES* and *ADMISSIONS*), and if discovery in this form has not been had, it will be necessary to consider whether it should be applied for, or, if it has been obtained, to consider whether the answers are sufficient. A notice to admit facts under Order 32, r. 4, may be advisable. The principal evidence in the case is generally that of witnesses given *vivâ voce* in Court (Order 37, r. 1), but the parties may agree to take the witnesses' evidence wholly or in part by affidavit (Order 37, r. 1; Order 38, rr. 25–30), in which case the regulations of the last-cited rules must be carefully attended to. It may be necessary to take evidence on commission (*q.v.*).

Discovery of documents should be applied for in almost all cases. The proof of public documents is in many cases governed or facilitated by special statutory rules. A very convenient table of these is to be found in Wills on *Evidence*, and they are also collected in Roscoe and Taylor on *Evidence*. The rules, which in general forbid the production in evidence of copies, or other secondary evidence of documents, must be carefully considered, and the notices to produce should be settled. (See *DOCUMENTS, PROOF OF.*) Notices to admit documents are usually given.

Expense and trouble in the proof of particular facts may often be saved by the aid of Order 30, r. 7, which enables the Court or a judge to give special directions as to this. Great advantages have been recently obtained from this rule in the Commercial Court (*q.v.*), but its operation extends equally to all branches of the High Court (*Baerlein v. Chartered Mercantile Bank* [1895], 2 Ch. 488). It is remarkable that the power conferred by it is not more often invoked (see *per* Lord Russell, C. J., in 72 L. T. 850). Besides the matters above referred to, the questions of sufficiency of parties and of place and mode of trial have often to be reconsidered when preparing the opinion on evidence. The proper time for the opinion to be obtained is usually before notice of trial is given (see Odgers on *Pleading*, 2nd ed., p. 240; and Cole on *Ejectment*, p. 140).

Ad vitam aut culpam.—An office is said to be held *ad vitam aut culpam* when the tenure of the holder is determinable only by his death or delinquency, one which is in fact held *quamdiu se bene gesserit*.

Advocate.—One who pleads the cause of another in a Court of law, or other judicial tribunal.

• *His Duty*:—Is twofold—to advise his client before going into Court, and to act for him when in Court.

The Right of Advocacy in the House of Lords, Privy Council, Courts of Appeal, Chancery and Queen's Bench Division (Common Law), and Probate, Divorce, and Admiralty Division, is limited to barristers. In the bankruptcy branch of the High Court, in the County Courts, at Quarter Sessions (in the absence of the Bar), and in Police Courts, solicitors have the right; but in the case of County Courts, the solicitors entitled to audience are those only who are generally retained in the action. In exercise of the power which an arbitrator has of regulating the proceedings before him, he can refuse to allow the parties to be represented by advocates (Redman on *Arbitration*, p. 118). Under s. 9 of the Local Government Act, 1894, an arbitrator holding a public inquiry, for the purposes of the section, shall not, except in such cases as may be prescribed, hear counsel. See AUDIENCE, RIGHT OF.

Retainers—General.—General retainers are either ordinary or limited. An ordinary general retainer applies to the Supreme Court and House of Lords. A limited general retainer applies to the tribunal or tribunals or Court or Courts to which it is expressed to be limited. A separate general retainer must be given for the Privy Council. A separate general retainer must be given for parliamentary committees. If the counsel who has accepted a general retainer from one party should be offered a special retainer or brief by another party, the general retainer entitles the party who has given it to reasonable notice before the offered special retainer or brief is accepted. Subject to these rules, a general retainer lasts for the joint lives of the client and counsel, unless the same be forfeited. In case a special retainer or brief is offered to counsel by a party other than the party from whom he has accepted a general retainer, the counsel, after giving notice to the party from whom he has accepted the general retainer of the offer of the special retainer or brief, is at liberty to accept the special retainer or brief of the other party, unless a special retainer or brief be given within a reasonable time by the party from whom he has accepted the general retainer. Where a general retainer has been given, and a brief is not delivered to the retained counsel in any action or other proceeding in which the party giving the general retainer is concerned, and to which it applies, or a special retainer or brief is not given within a reasonable time after a notice has been given by the counsel holding a general retainer, that a special retainer or brief has been offered to him by another party, the general retainer is forfeited; provided that the holding of a general retainer does not entitle a Queen's Counsel to the delivery of a brief on occasions when it is usual to instruct a junior counsel only. Where a general retainer has been given for one person, and he is party to a proceeding with others and appears separately, the retainer applies to that proceeding; but if he appears jointly with others, the retainer does not apply, and remains unaffected.

Special.—A special retainer cannot be given until after the commencement of an action, appeal, or other proceeding. A special retainer in an

action or proceeding in the Supreme Court gives the client a right to the services of the counsel while the action or proceeding remains in or under the control of that Court. A special retainer in an action or proceeding, other than an action or proceeding in the Supreme Court, gives the client a right to the services of the counsel during the whole progress of such action or proceeding. A counsel who has been specially retained is entitled to the delivery of a brief on every occasion to which the special retainer applies; provided always: A special retainer does not entitle a Queen's Counsel to the delivery of a brief on occasions when it is usual to instruct junior counsel only. Where more than one junior counsel has been retained, only one of such junior counsel is entitled to the delivery of a brief on occasions when it is usual to instruct one junior counsel alone.

Circuit Retainers.—A special retainer must be given for a particular assize. If the venue be changed for another place on the same circuit, a fresh retainer is not required. If the action be not tried at the assize for which the retainer is given, the retainer must be renewed for every subsequent assize until the action is disposed of, unless a brief has been delivered. A retainer may be given for a future assize, without a retainer for an intervening assize, unless notice of trial shall have been given for such intervening assize.

On Appeals.—When a counsel has held a brief for any party in an action or proceeding, but has not received a general or special retainer, he shall not accept a general retainer or special retainer or a brief on appeal (including in that expression appeals to the House of Lords and to the Privy Council (*q.v.*)) for any other party, without giving the original client the opportunity of retaining or delivering a brief to him.

Opinions and Pleadings.—Counsel who has drawn pleadings or advised, or accepted a brief, during the progress of an action on behalf of any party, shall not accept a retainer or brief from any other party without giving the party for whom he has drawn pleadings or advised, or on whose behalf he has accepted a brief, the opportunity of retaining or delivering a brief to him, but such counsel is entitled to a brief at the trial, and on any interlocutory application where counsel is engaged, unless express notice to the contrary shall have been given to him with the instructions to draw such pleadings or advise, or at the time of the delivery of such brief. Provided always, such counsel shall not be entitled to a brief in any case where he is unable or unwilling to accept the same without receiving a special fee. No counsel can be required to accept a retainer or brief or to advise or draw pleadings in any case where he has previously advised another party on or in connection with the case, and he ought not to do so in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by the other party, or in which his acceptance of a retainer or brief or instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him; and in any such case it is the duty of the counsel to refuse to accept such retainer or brief, or to advise or to draw pleadings, and in case he has received such retainer or brief inadvertently, to return the same. The retainer of a counsel does not cease upon his being promoted to a higher rank at the bar.

Amount of Fees.—The fees for *general* retainers are as follow :—

In Parliament (committees)	Ten Guineas.
In all other cases	Five Guineas.

The fees for *special* retainers are as follow :—

In Parliament (committees)	Five Guineas.
In the House of Lords and Privy Council	Two Guineas.
In all other cases	One Guinea.

The Relation of Advocate and Client.—The relation creates the incapacity to make a contract of hiring as an advocate, and the services of an advocate create neither an obligation nor an inception of an obligation, nor any inchoate right whatever, capable of being completed and made into a contract by any subsequent promise (Erle, C. J., in *Kennedy v. Brown*, 1862, 13 C. B. N. S. 677). Consequently, if the advocate fails to render the services for which he is retained, or performs them negligently, the client has no remedy against him either to recover back the fee paid or for damages for his failure or negligence. As to admissions by counsel, see ADMISSIONS; PRIVILEGED COMMUNICATIONS.

How remunerated.—By the payment of a fee or honorarium, which when offered he is at liberty to refuse or accept, but if unpaid he cannot recover it by an action. And if the client has paid the advocate's fee to the solicitor, the advocate cannot recover it from the solicitor as money paid to his use (see *re Le Brasseur & Oakley* [1896], 2 Ch. 487, 493). If in his professional character as an English barrister he accepts a retainer to appear and plead before commissioners or arbitrators in a foreign country, by whose law counsel practising in its regular Courts were permitted to have suit for their fees, that would not give him a right of action for his *honorarium* (*R. v. Doutré*, 1884, 9 App. Cas. 752).

Scope of his authority.—The authority given by the client to the advocate is as follows:—When acting as an advocate in Court, he has unlimited power to do what is best for his client in the cause. "His retainer gives him complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, or calling a witness, or selecting such as in his discretion he thinks ought to be called, and all other matters which properly belong to the suit and the management and conduct of the trial" (*Swinfen v. Lord Chelmsford*, 1860, 5 H. & N. 890; *Sträuss v. Francis*, 1866, L. R. 2 Q. B. 379).

Limitation.—He has not, by virtue of his retainer, in a suit any power over matters that are collateral to it. And if the other side is told that his authority has been withdrawn or is limited, the client will not be bound by any act of the advocate in the one case, or outside the limited authority in the other (*Swinfen v. Swinfen*, 1856, 1 C. B. N. S. 364).

Revocation.—Where a party appears in Court by counsel, and the case is on, and the counsel has been fully seized of it, his authority cannot be revoked by his client so as to give the client himself the right to address the Court. But if counsel is not so seized, or where upon a motion the hearing has gone no farther than reading affidavits, and the counsel has addressed no arguments to the Court, he may at the instance of his client be permitted to withdraw, and the client may himself be heard (*R. v. Muzbury*, 11 L. T. 566).

His power to Agree, Settle, Refer, and Compromise.—If, acting within the limits of his apparent authority, he enters into an agreement with the counsel on the other side, this agreement is binding on the client (*Sträuss v. Francis*, 1866, L. R. 1 Q. B. 379). It seems that in general a reference by the consent of counsel in a cause will be binding upon the client. Certainly, if the client is present and does not repudiate the authority (*Redman on Arbitrations*, 15). When a compromise is contemplated, and litigation is to cease upon terms to be arranged, counsel can then only act under special instructions (*Crowder, J., in Swinfen v. Swinfen*, 1856, 1 C. B. N. S. 364). Counsel in a breach of promise of marriage action was held to have authority to agree to judgment being entered for the defendant upon terms, but not to agree to deliver up the defendant's letters (*Kempshall v. Holland*, 1895, 14 R. 336).

Consent.—When counsel has once given his consent to a compromise, and there has been no mistake or error, that consent cannot be withdrawn (*Harvey v. Croydon*, 1884, 26 Ch. D. 249).

Mistake.—But if he says, "I made a concession under a misapprehension," he will not be held bound to the mistake (*Holt v. Jesse*, 1876, 3 Ch. D. 180; *Hickman v. Berens* [1895], 2 Ch. 638).

His Evidence is obtained by his statement from his place in Court, and not by affidavit. See *Law Jo.* vol. 30, p. 693.

Exceeding or abusing his Authority.—For this the client has no remedy against him. If, however, an advocate, although he has unlimited power in respect of the conduct of a cause in Court, does what the Court may think wholly unjust as between the parties, then the Court would have power to overrule what was done and send the case for a new trial (*Mathews v. Munster*, 1888, 20 Q. B. D. 141).

In Criminal Cases.—As prosecuting counsel the function of the advocate is that of an official of justice, not of a partisan, and extreme fairness is a law governing his duty. The same rule holds good in lunacy proceedings. See LUNACY. A defending counsel, whilst he may put forward any theories on behalf of his client, should not state to the jury, as actual existing facts, matters which he has been told in his instructions on the authority of the prisoner, but which he does not propose to prove in evidence (*Roscoe, Crim. Ev.* 204). But a prisoner defended by counsel may, at the conclusion of his counsel's speech, make his statement to the jury, with this proviso, that what he states from the dock is subject to the right of reply on the part of the prosecution, as being in the nature of new matter laid before the jury (*R. v. Skimmin*, 1849, 15 Cox C. C. 122). *The right of reply* exists where evidence is given for the defence, but is rarely exercised. The Attorney-General in person has the right of reply, whether evidence is given by the defence or not. See ATTORNEY-GENERAL; and see also REPLY.

Immunity from Action for Defamation.—The privilege of an advocate with respect to defamatory words, uttered by him as advocate in the course of a judicial inquiry, is absolute and unqualified. No action can be maintained against him for such words, even though they were irrelevant and spoken maliciously and without reasonable cause. "The Court can control all the proceedings and persons before them, and safeguards are thus provided against licence and excess; but if such an action as this were allowed, no person would be free from fear, arduous duties could not be efficiently performed, and the public would be injured" (Fry, L. J., in *Munster v. Lamb*, 1883, 11 Q. B. D. 588). He may be punished for contempt of Court (*q.v.*), even for language professedly used in the discharge of his functions as an advocate (*Ex parte Pater*, 1863, 5 B. & S. 299).

Maintenance.—An exception to the general rule with regard to maintenance of actions is the case of counsel. See also BAR.

Advocate, Crown.—See ADVOCATE, QUEEN'S.

Advocate-General.—See ADVOCATE, QUEEN'S.

Advocate, Lord.—The Lord Advocate is the chief law officer of the Crown in Scotland, and one of the great officers of State in Scotland. He is appointed by the Crown, and it is his duty to act as public prosecutor,

and to plead in all cases in which the Crown is interested. He has power to issue warrants for arrestment and imprisonment in any part of Scotland. He and the Solicitor-General are the only members of the Scotch Bar who have hitherto had seats within the Bar. Both of the Scottish law officers are allowed to engage in private practice. Since the Union, the Lord Advocate has generally sat in Parliament. The Act 48 & 49 Vict. c. 61, which created the office of Secretary for Scotland, did not affect the powers and duties of the Lord Advocate.

In Scotland the consent of the Lord Advocate—as in England the consent of the Attorney-General—is required for the initiation of many proceedings, as, *e.g.*, the recovery of statutory penalties; and so, in patent and lunacy matters, the Lord Advocate exercises functions similar to those of the Attorney-General, except that, as regards patents, the fiat of the Lord Advocate is required in all cases.

[Kames' *Statute Law*, see "King's Advocate"; Bell's *Dictionary and Digest of the Law of Scotland*.] See ATTORNEY-GENERAL.

Advocate, Queen's.—His Majesty's Advocate-General, often called for shortness the King's Advocate, and during the reign of her present Majesty, the Queen's Advocate, was the principal law officer of Her Majesty in the College of Advocates at Doctors' Commons, and in the Admiralty and Ecclesiastical Courts, just as the King's or Queen's Procurator or Proctor filled for those Courts, and the matters discussed therein, the functions assigned in the Superior Courts of Law and Equity to the Solicitor for the Treasury. Before the High Court of Delegates, and at the bar of the Privy Council, where advocates and barristers had both right of audience, an advocate took precedence of an ordinary barrister (Stephen, *Blackstone*, 1890, iii. 394); and before the same Courts the Advocate-General took precedence in like manner of the Attorney-General and Solicitor-General (*Barton v. R.* 1840, 2 Moo. P. C. 29; *Dyke v. Walford*, 1846, 5 *ibid.* 447; *Harrison v. R.*, 1856, 10 *ibid.* 201; Manning, *Serviens ad Legem*, 1840, 19 & 20; Stewart, *Blackstone*, 1840, iii. 29); and in cases laid by the Crown before the three law officers for their opinion, the Advocate-General had the precedence. Thus, in the joint opinion given in the *Bishop of Clogher's* case in 1822, Sir Christopher Robinson takes precedence of Lords Gifford and Lyndhurst, then Attorney and Solicitor General (Phillimore, *Ecc. Law*, i. 73). When, however, barristers and advocates were admitted to practise equally in all Courts, it was felt that the Attorney-General could have no leader in Westminster Hall; and accordingly, on the resignation of Sir John Harding in 1862, and the appointment of Sir Robert Phillimore, the Crown directed that the Attorney-General and Solicitor-General should take precedence, in the future, of the Queen's Advocate. On the appointment of Sir Robert Phillimore in 1867 to be judge of the High Court of Admiralty, the place was filled by Sir Travers Twiss, and, since the latter's resignation in 1872, the office has not been filled up.

It was the practice that the Advocate-General should represent the Crown in all matters in the Admiralty and Ecclesiastical Courts (*King's Proctor v. Stone*, 1808, 1 Hag. Con. 424; *The Rebekah*, 1799, 1 Rob. C. 228); and that in all international and ecclesiastical questions his opinion should be taken, either with or without the other law officers of the Crown. He was specially consulted by the Foreign Office, and Orders in Council used to be submitted to him for his approval. After the fusion of the two bars, he appeared with the other law officers in such cases as *A.-G. v.*

Sillem (*The Alexandra*, 1863, 2 H. & C. 431, an offence against the Foreign Enlistment Act), *Ryves v. A.-G.* (1868, 37 L. J. Matr. 75).

The second law officer of the Crown in the Admiralty Court was the Admiralty Advocate, whose duty it was to appear for the Crown in its office of Admiralty. "The distinct capacities of the King claiming *jure coronæ* and in his office of Admiralty occasioned a necessary distinction of officers employed to enforce his rights—a King's Advocate and King's Proctor or Procurator-General—an Advocate of the Admiralty and Proctor for the King in his office of Admiralty" (Browne, *Civil Law and Law of Admiralty*, 1802, 67). He had been originally the Advocate for the Lord High Admiral. In certain cases, where it was disputed whether the Crown was entitled *jure coronæ* or in its office of Admiralty, the Queen's Advocate and the Admiralty Advocate represented their different departments against each other (*The Rebekah*, *ante*, a question whether an enemy's ship was prize or a droit of Admiralty; *The Panda*, 1842, 1 Rob. W. 423, a question whether the property of pirates was prize or a droit of Admiralty, Sir J. Dodson being the Queen's Advocate and Dr. Phillimore the Admiralty Advocate). At times both officers appeared for the Crown in its office of Admiralty together (*R. v. Belcher*, 1849, 6 Moo. P. C. 471, a piracy case). The office is now vacant.

It is worthy of notice that the title Advocate is still used in some of our colonies and possessions to denote the chief law officer of the Crown there: thus, in Sierra Leone, Lagos, and Cyprus, he is called the Queen's Advocate; in Malta, the Crown Advocate; in Mauritius, the Procureur and Advocate-General; and in the Indian Presidencies, Advocate-General.

Advocates, College of.—In England, an advocate was a member of a society of men voluntarily associated as a distinct profession for the practice of the civil and canon law. Some of the members of this body purchased, in 1567, the site of Doctors' Commons, and, at their own expense, erected houses for the residence of the judges and advocates, and proper buildings for holding Ecclesiastical and Admiralty Courts. By a rescript of Chas. II. after the Fire of London, they were exempted from "payment of taxes, burdens, and impositions, in the same way as the societies of the Serjeants' Inn." In 1768 a Royal Charter was obtained, by which the members of the society and their successors were incorporated under the name of the "College of Doctors of Law exercent in the Admiralty and Ecclesiastical Courts." The president of the college was the Dean of Arches, and the fellows were elected after admission by rescript of the Archbishop of Canterbury, and must previously have taken the degree of Doctor of Laws in one of the English universities (Burns' *Eccl. Law*, by Phillimore, tit. "Advocate"). They had the exclusive right to practise in the Ecclesiastical and Admiralty Courts. In 1857, when the Probate and Divorce Courts were created, the college was abolished, and advocates were admitted freely to all Courts; while at the same time barristers were admitted to practise in the new Courts, and after 1859 in the Admiralty Court; and now also in the Ecclesiastical Courts (Phillimore, *International Law*, vol. i. Preface; *Eccl. Law*, 2nd ed., ii. 935). See ADVOCATE.

Advow, Avow, or Avouch.—See AVOWRY.—Under the feudal system, when the right of a tenant was impugned, he had to call upon his lord to come forward and defend his right. This was called *advocare*,

voucher à garantie, to vouch or call, to warrant. The calling of the lord of the fee to defend the right of the tenant involved the admission of all the duties implied in feudal tenancy. Avower came to mean the admission by a tenant of a certain person as feudal superior, and ultimately was employed in the sense of performing the part of the vouchee, or person called on to defend the right impugned. See AVOWRY.

Advowson.—*Meaning of the Word.*—An advowson is a right of presentation or appointment to an ecclesiastical foundation in a man and his heirs for ever. It is given by Blackstone, *Com.* bk. iii. p. 21, as an instance of an incorporeal hereditament. This right is known in the canon law as the *jus patronatus*.

Classes of Advowsons.—Advowsons are divided into two classes—advowsons appendant and advowsons in gross.

An advowson appendant may be defined to be a right of presentation appertaining to some corporeal hereditament, *e.g.* a manor or the demesne lands of an earldom. Properly speaking, however, an advowson should be said to be appendant to the demesnes of the manor or earldom, or some part thereof, which are of perpetual subsistence, and not to the rents and services, which cannot support such appendancy; for an advowson can only be appendant to a thing corporate. An advowson appendant passed with the grant of a manor by livery without deed and without saying *cum pertinentis*. "A church in one county may be appendant to a manor in another, or the advowson of a vicarage may be (and is of common right) appendant to a rectory or to a manor by prescription" (Mirehouse on *Advowsons*, p. 9); and advowsons may also be appendant for a part or for a turn.

An advowson in gross may be defined as an advowson belonging to a person who possesses no corporeal estate to which it is appendant, and which may therefore be defined as a right subsisting by itself, belonging to such person and not appendant to any corporeal hereditament whatever (Mirehouse on *Advowsons*, p. 12).

An advowson appendant is converted into an advowson in gross by a grant of either the advowson or that to which it is appendant, the one without the other; also by a presentation to an advowson appendant to as an advowson in gross. But the disappendancy may be only temporary. Thus, if the severance is effected by a grant or lease for a life of either the manor or the advowson, the one without the other, it again becomes appendant at the expiration of the life; if by an allotment of the manor to one coparcener and the advowson to the other, or the demesnes to one and the services to the other, by the reunion of possession on the death of the one or other without issue; "if by the alienation of part of the manor, with the advowson, or by the usurpation of a stranger, on the recovery of possession by the owner" (see 7 Anne, c. 18). Other examples of a temporary severance are the cases of a mortgage of the manor without the advowson, when the repayment of the money makes the advowson again appendant by reputation; a fine of the advowson with a grant and render back of every second turn, a partition of the manor by two coparceners without mentioning the advowson, and a union of one advowson appendant and another in gross—in all which three cases the appendancy revives for every other turn. If two joint tenants are seised of a manor with an advowson appendant, and the one releases to the other all his rights in the advowson, it is both appendant and in gross; but if two of three joint tenants make such a release to the

third, he is seised of two parts of the advowson in gross, and of the third part as appendant.

But the general rule is, that when an advowson is once severed by a conveyance of the fee-simple, either of the corporeal hereditament, apart from the advowson, or of the advowson apart from the corporeal hereditament, the advowson can never afterwards be appendant.

Advowsons are also divided into presentative, collative, donative, and elective.

An advowson presentative is an advowson in which the patron has the right of presenting a person to the ordinary, to be instituted and inducted into the church.

An advowson collative is an advowson lodged in a bishop, as collation is the conferring of a benefice by a bishop; but in this case the bishop cannot present to himself.

An advowson donative is a spiritual preferment in a church, chapel, or vicarage which is in the gift or disposal of the patron only, and without presentation, institution, or induction. See PRESENTATION.

An advowson elective is where a corporation (*e.g.* a dean and chapter) has a right to elect the person to fill the benefice.

A distinction should also be drawn between nomination and presentation. They indicate distinct rights, and may exist in different persons. Thus, generally the owner of the legal estate has the right to present the clerk to the bishop, but the beneficial owner has the right of nominating the person to be presented.

There is a further distinction between ecclesiastical and lay advowsons. An ecclesiastical advowson is so called, not because an ecclesiastic doth enjoy or possess it, for so he may a lay patronage, but because it belongs to one, for that he hath founded, built, or endowed the church *ex bonis ecclesiasticis*. The other kind of advowson (lay) is so called, for that it belongs to one, because he hath founded, built, or endowed some church, or erected some benefice, *ex bonis patrimonialibus* (God. Int. p. 34).

In the advowsons of a moiety of a church there is also a distinction drawn between *advocatio medietatis ecclesiæ* and *medietas advocacionis ecclesiæ*. The former is where two patrons have a right to present a several incumbent, and such advowson is in both of the patrons alike. The latter applies to the case of parceners who, after division, have the right to present in turn. (See further as to this, PRESENTATION).

Historical Origin of Advowsons.—The right of advowson arose, according to the old authorities, *ratione donationis*, *ratione foundationis*, *ratione fundi*.

Such a right, however, would have been incapable of existence or exercise in the first three centuries of Christianity. At that period the oblations of the faithful for the support of the Church were given to the bishop, who accounted for them to the provincial synod; and the congregation of the faithful laity took a prominent part in the election, both of bishops and presbyters, both of which customs are inconsistent with the patronage system as known to the Canonists or the English law.

The first trace of the practice, where the right to an advowson sprung, is to be found in a decretal of the Council of Orange, A.D. 448, which allowed a bishop who had built a church in the diocese of another bishop, to nominate the clerk thereof. The 123rd Novel of Justinian (promulgated in the sixth century) decreed that "if a man should erect an oratory and desire to present a clerk thereunto by himself or his heirs, if they furnish a competency for his livelihood, and nominate to the bishop such

as are worthy, they may be ordained." Advowsons and patronage, as a portion of ecclesiastical organisation, must be taken to have grown up gradually throughout Western Europe as an incident of the feudal or manorial system. It is a leading idea of the Canonists that every benefice must be presumed to possess a patron, for benefices do not come into existence naturally of themselves, but are the artificial creation of laymen, who are, for the most part, the founders of churches. The decretals laid it down that, if any man built a church with the assent of the bishop, he acquired from the fact the right of patronage.

It is difficult to trace the origin or growth of advowsons in England. It appears that at least two centuries after the conversion of the island, the clergy received their maintenance from the cathedral church, and ministered only *pro tempore* at the parochial churches. Properly speaking, also, the bishop is incumbent of all livings in his diocese; and the English nobility, in a letter to the Pope, 1239, speak of presentation to the bishop as a thing immemorial. Gradually, after the Norman Conquest, when the relations between Church and State became more sharply defined, the *prava consuetudo*, as it is described in a letter of Pope Honorius the Third to Thomas à Becket, Archbishop of Canterbury, sprung up of patrons appointing to livings not only without the consent, but actually against the will, of the bishop,¹ and often in consideration of money payments. The tendency of the feudal lawyers was, therefore, to turn advowsons, which were probably all presentative in their origin, into donative. The Canonists thereupon endeavoured to bring back patronage to its original idea as a spiritual trust. Thus, in a decretal letter to the Bishop of Exeter, Pope Gregory the Ninth lays it down, that if anyone purchases an advowson to present to it his son, or grandson, or any other person, he is to be deprived of it. Other decretals of the same Pope laid it down, that if any clergyman purchased the right of advowson or next presentation, he should be deprived *ipso jure*, and that the patron should forfeit his right if convicted of any notorious crime, *e.g.* heresy. Probably as a result of the influence of the Canonists, the majority of advowsons in England are presentative and not donative.

Advowsons as a Trust.—The right of the owner of an advowson is described by the Canonists as *honorificum*, because he was entitled to respect from the parish, and the chief seat in the church; *onerosum*, because he was bound to protect the Church and her revenues against attacks by violence as *patronus armatus*, or to maintain her cause in the law courts as *patronus togatus*, and to secure her fabric and appurtenances against dilapidations; and *utile*, because, if he or his family "fell into penury, the Church was bound to supply their necessities before those of anyone else."

The owner of an advowson is described as *patronus defensor*, *advocatus custos*; but Lyndwood states that *advocatus* more properly signifies defender than patron.² The word *advocatus*, it may be mentioned, was applied to the Holy Roman Emperor as the guardian of the temporal estates of the whole Catholic Church. In the same way, the lord of a fief was regarded as the natural *advocatus*, or defender, of the Church in his district. His position, in fact, was, to a large extent, to use modern language, that of a trustee; and for this "reason the law still treats an advowson for some purposes as a trust, and recognises the right of the patron, though he has no estate in the freehold of the living, to protect the interests of the Church. Thus the right

¹ Blackstone's view, that all advowsons were originally donative, and founded by royal licence, can hardly be supported from a historical point of view.

² *Advocatus intelligitur non pro patrono; sed pro defensore ecclesie* (see God. p. 280).

and property which a patron has in advowson will not warrant a plea (as in the case of temporal possessions) that he was seised in *dominio suo ut de feodo*, as of fee, but only of fee; because that inheritance, savouring not *de demo*, cannot either serve for the sustentation of him and his household, nor can anything be received for the same for the defraying of charges" (*Inst.* 17).

(See, however, H. M. Hargreave's note, *Harg. Co. Lit.* 19 *b* (n), 2, and 1 *Inst.* 29.)

In the same way, a guardian in socage of a manor to which an advowson is appendant, cannot present to an advowson, because he can take nothing for it, and consequently cannot account for it; and therefore, in that case, the heir shall present, of what age soever, though probably the Court would control the discretion of an infant heir if acting apart from his guardian (3 *Inst.* 156; *Arthington v. Coverley*, 1732, 2 Abr. Ca. Eq. 518); and in *John London v. The Chapter of Southwell*, 1619, Holt, 350, the Court held that the words in the conclusion of a lease, "with all the commodities, emoluments, profits, and advantages to the prebendary belonging" would not suffice to pass the advowson, as these words imply "things gainful, which is contrary to the nature of an advowson regularly." And in a writ of right of advowson, the patron was not to allege the taking of profits in himself, but in his incumbent.

The law recognises the right of the patron, although he has no estate in the freehold of the benefice, to protect the property against waste.¹ Thus, in *Hoskins v. Featherstone*, 1789, 3 Bro. C. C. 552, during the vacancy of a living, an injunction was granted, at the suit of the patroness, against the widow of the deceased rector, to stay waste. And in *Knight v. Mosely*, 1742, 1 Amb. 175, an injunction was granted, at the suit of the patron, against the incumbent, to stay waste by working stone; but it was held that the patron could not have an account against the incumbent, as he cannot have any profit from the living. The patron's consent has been held necessary to enable the incumbent to work mines (but as to this, see GLEBE); and, generally, it would appear that the patron may interpose to prevent any kind of waste of the benefice. (See *Ross v. Adcock*, 1868, L. R. 3 C. P. 655, and cases there cited; and *Ecclesiastical Commissioners v. Wodehouse* [1895], 1 Ch. 552).

Advowsons as a Form of Property.—Advowsons have, however, at least from the thirteenth century, been recognised as a form of property, though never unreservedly as a form of property. In fact, it may be said that in the law's treatment of advowsons, two different ideas are manifested. On the one hand, from the time it became clear that the right to present to a living was a valuable asset, the law has striven to protect it, except, perhaps, in the case of donatives, which are not favoured by the law. For, according to Lord Coke, if the patron of a donative once presented to the ordinary, and the clerk was admitted, it became presentative, and should never be a donative again; but this was not held (1 *Inst.* 344) to be law in *Ludd v. Widows*, 1694, 2 Salk. 541 (on this question, see PRESENTATION); and in *R. v. Foley*, 1846, 2 C. B. 664, on the construction of a private Act of Parliament with regard to a chapel of ease, containing the words "the patronage of or right of presentation to the chapel as well as the patronage," etc. "of the new church should be vested in the patron of the rectory—so, nevertheless, that the minister of the chapel should not be removable at pleasure,"—it was held that the chapel of ease was made presentative and not donative.

On the other hand, the policy of the law has always been to prevent

¹ But it is doubtful if he can bring an action for trespass on the glebe during the vacancy of the incumbency.

simony (see SIMONY); and therefore, except in the case of the Crown, it has always regarded the "execution" of the advowson—that is, the actual right to appoint to the benefice when the church is actually void—as a thing of a purely spiritual character, and of which profit cannot be made, and should not be made.

As the canon law did not look upon an advowson as a thing merely spiritual, but rather as a temporal right annexed to what is spiritual, an advowson was unable altogether to protect it by the sanctions of religion. Moreover, the common law presented great difficulties in the way of the recovery of such a form of property, if once lost, especially to persons under a disability, for the only seisin that then could be to an advowson was the exercise of the right of presentation, and if any hindrance or obstruction was made so as to prevent a patron from presenting a clerk (which was called an usurpation), and the patron was put out of possession of the advowson, the usurper gained the fee at common law, and the patron was left to the difficult remedy of a writ of right.

To remedy this evil the statute of 13 Edw. I. c. 5, was passed. This statute gives a remedy to persons under disability, provided that the plea or the part of the defendant, that the church was full through his appointment, should not be a defence if the writ be "purchased" within six months, and gives damages to the patron for the loss of his presentation. And the statute of 7 Anne, c. 18, gives a further remedy, by enacting that no usurpation shall displace the estate or interest of the patron, but that the true patron may present at the next avoidance, as if no such usurpation had happened. The only writ used in modern times in the case of a disturbance of patronage was the *quare impedit*, abolished by 23 & 24 Vict. c. 26. Actions of this kind are now tried like ordinary actions (for a further discussion on the subject, see PRESENTATION). At common law, there was no limit provided as to the time at which actions for the recovery of advowsons might be brought.

A limit is now fixed by 3 & 4 Will. IV. c. 27, s. 30, namely, the period during which the clerks in succession shall obtain and hold possession adversely (see ADVERSE POSSESSION) to such right of presentation; if such incumbencies together amount to sixty years, or after such times as with the time of such incumbencies will make up sixty years.

By sec. 4, if the right of bringing an action is barred under this Act, the right of the person claiming is extinguished.

An advowson in gross, as a form of property more beneficial to the grantee, is more favoured by the law than an advowson appendant; and in a case where the grant could be construed as an advowson in gross or an advowson appendant, it was construed as an advowson in gross (33 Hen. 8; Dyer, 40).

A person may be tenant in fee-simple of an advowson, as well as of a piece of land, in which case he and his heirs have a perpetual right of presentation. An advowson will descend to the heir on an intestacy.

An advowson may also be limited to a person for a life, or lives, or years, in possession, remainder, or reversion. And it may be held in joint tenancy, in coparcenary, or in tenancy in common. A husband will be tenant by the curtesy of an advowson, though the church be not void during the coverture. When a widow is endowed of a manor to which an advowson is appendant, she is entitled to it. A widow is also dowable of an advowson in gross, and entitled to the third presentation. An advowson in gross may be transferred by every species of conveyance applicable to the transfer of incorporeal real hereditaments, according to the nature of the proprietor's

estate in the advowson; and an advowson appendant, by every conveyance by which the corporeal property to which it is appendant can be transferred (but as to collative advowsons, see *post*).

An advowson appendant will pass with the manor without any express words, *e.g. cum pertinentis*, except in the case of the king. An advowson will not pass by the word "land," but it will by "hereditaments" or "church"; and the Act 1 Vict. c. 26, s. 1, provides that the words real estate shall include advowsons. In the case of the king, by the Statute *Praerogativa Regis* it will not pass "when he giveth or granteth" (*secus*, when he restoreth) land or a manor, "unless he make express mention in his deed or writing," *e.g.*, that is, when he nameth the advowson, or useth such expressions as "with the appurtenances," or "as fully and perfectly."

An advowson may be the subject of a mortgage, but a mortgagee must present the nominee of the mortgagor (see PRESENTATION).

An advowson in gross will, in the case of an intestacy, descend to the heir, but if, in the case of a presentative advowson, the church has become vacant in the life of the testator, the right of presentation is in the executor. An advowson in the hands of an executor is assets (see *John London v. the Chapter of Southwell, supra*); but if the patron grants the next avoidance of a church to a testator who dies before presenting, and after his death his executor presents and has the benefit of preferring his son or friend, yet this shall make no assets in his hands, because he could not lawfully take money to present. But if a stranger presents and gets his clerk admitted, and the executor recover damages in an action by way of what was of old a *quare impedit*, the money so recovered will be assets. If the testator has died before the church becomes void, the executor will be charged with the value as assets if he has neglected a proper opportunity to make a sale (Williams on *Executors*, 9th ed., pp. 1537-8). It should be noted that the void turn of a donative descends to the heir, and also of a presentative advowson, if the owner of the advowson is also incumbent of the church (see PRESENTATION).

The devise of an advowson or of the right of presentation is good even if made by the incumbent of a church, the inheritance of the advowson being in him, and he may nominate the person to be appointed by his executors.

The owner of an advowson may alienate the next or any number of presentations.

In the case of donatives, the right of donation descends to the heir when a vacancy has occurred in the lifetime of the ancestor (*q.v.*). Lord Coke (1 *Inst.* 374 *b*) said that an advowson is assets to satisfy a warranty, but that an advowson in gross is not extendible upon a writ of elegit, because no annual value can be set upon it. An advowson appendant to a manor is clearly real assets to satisfy debts, because, the manor being assets, what is appendant must be assets likewise (*Westfaling v. Westfaling*, 1747, 3 Atk. 464). And it has also been held by the House of Lords that an advowson in gross, whether the interest of the proprietor be legal or equitable (see ASSETS), is assets for the payment of debts, and will be sold by the Court for that purpose (*Robinson v. Tonge*, 1730, 1 Bro. P. C. 114; *Kinaston v. Clark*, 1741-2, *ib.* at 206). And under the Bankruptcy Act, 1883, s. 44, subs. 11, an advowson or right of next presentation to a benefice will vest in the trustee in bankruptcy, and may be sold by him in the ordinary way. But if the benefice is vacant, he cannot sell the right of presentation, nor can he present to the vacant benefice. The right of presentation will remain with the bankrupt.

By 1 Eliz. c. 19, and 13 Eliz. c. 19, ecclesiastical persons seized of advowsons in right of the Churches, and masters and fellows of colleges, and guardians of hospitals seized in right of their houses, are restrained from making any grants but of things corporeal, and therefore cannot make grants of advowsons; such grants, if made, have been held good, but only as against themselves (*Armiger v. Bishop of Norwich*, 1599, Cro. (1), 690; and *Rennell v. Bishop of Lincoln*, 1827, 7 Barn. & Cress. 74); but such alienations are not now favoured by the Courts (*Ecclesiastical Commissioners v. Wodehouse*, *supra*). By 13 Anne, c. 11, it is enacted that if any person purchase any benefice with cure of souls or living ecclesiastical, and shall be presented or collated thereupon, such presentation or collation shall be void, and it shall be lawful for the Queen, her heirs and successors, to present or collate unto such benefice or living for that one turn or time only.

Exchange of Advowsons.—Several modern Acts have been passed on the subject of the exchange of advowsons, namely, 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39; 16 & 17 Vict. c. 50; 23 & 24 Vict. c. 124; 31 & 32 Vict. c. 114; and 33 & 34 Vict. c. 39. The object of these Acts is to enable bishops and other patrons, with the consent of the Ecclesiastical Commissioners, by exchange of advowsons or other alteration in the exercise of patronage, to secure the better performance of spiritual duties in ill-endowed parishes, and other kindred purposes.

(For questions relating to presentation, collation, induction, or admission, see PRESENTATION.)

See also INCORPOREAL HEREDITAMENT; ENTRY ON BENEFICE; PATRON; JUS PATRONATUS; INCUMBENT; GLEBE.

[*Authorities.*—Lindwood, *Prov.*; Gibs. *Cod.*; Godolphin, *Rep. Can.*; Van Espen, *Jus Canonieum*; Coke's *Institutes*; Coke on *Littleton*; Bingham, *Antiquities of the Christian Church*; Black. *Com.*; Mirehouse, *Advowsons*; Cruise, *Digest*; Phillimore, *Ecclesiastical Law*, 2nd ed.; Cripps, *Law of the Church and Clergy*.]

Affectum (Challenge Propter).—See JURY.

Affeerors.—Officers appointed by the steward of the Court of a manor or hundred to assess the AMERCIAMENTS (*q.v.*) imposed by it. There were usually two appointed, but occasionally four. The form of the oath which they took before acting is given in Kitchen, *La Court Lecte* (Ed. 1623), p. 46a. It seems that they were sometimes called *taxatores*, and it is probable that they were frequently called upon to assess not only amerciaments, but also the damages in complaints brought in inferior Courts.

Affidavit to hold to Bail.—See BAIL.

Affiliation.—The process by which the paternity of a bastard (see BASTARD), and the legal consequences arising from that relationship, are brought home to the father.

The law and the practice relating to the subject, which are far from simple, have been laid down in four statutes, and there have been numerous decisions, by which both the conditions of proof necessary to establish the

paternity, and also difficult points of the procedure, have from time to time been settled by the Courts. In instituting or in defending proceedings in bastardy, a rigid observance of the rules of procedure prescribed by the Legislature, and interpreted by the Courts, is necessary.

The duty of maintaining a bastard falls upon the mother; failing her, upon the guardians of the poor. But both the mother and the guardians have a remedy, by means of affiliation proceedings, against the father, if his identity be known, and if he be amenable to the jurisdiction.

The proceedings are begun, carried on, and, unless there is an appeal, concluded, in a Court of summary jurisdiction, and to enable the Court to enter upon the merits of the application, there must be certain main conditions precedent, which can be conveniently regarded under three heads—

First, As regards the child itself, it matters not where it was begotten (*Hampton v. Rickard*, 1874, 43 L. J. M. C. 133); but the birth must have taken place, or must take place (for the application may, in the first instance, as well be made before, as after, that event), in England or on an English ship (*Marshall v. Murgatroyd*, 1871, 40 L. J. M. C. 7). The fact of the child's death does not destroy the jurisdiction, though it limits the scope of the order to be made.

Second, It is necessary that the mother should be "a single woman," that is, a spinster, or a widow, or a wife living apart from her husband.

If she marry, after the application, but before the hearing, the Court loses jurisdiction, though the woman's marriage, happening after the order has once been made, will not have that effect, as the law now stands, not even though the husband has means to keep the child (*Sothorn v. Scott*, 1881, 6 Q. B. D. 518; *Hardy v. Atherton*, 1881, 7 Q. B. D. 64). If the mother die before the hearing, the Court loses all jurisdiction; her dying statement cannot be entertained.

Third, The alleged father must have reached the age of fourteen, at some date at which the child might have been begotten; otherwise the case *ab initio* fails against him, whatever may be the evidence. To bring the defendant duly before the Court, the summons must have been served in England; which implies that he must have resided at some time or another, for however short an interval, in England; though, failing personal service, it may be left in his absence at "his last place of abode" (see *Hampton v. Rickard*, *ut supra*).

The first step in the procedure is the application. Where the mother is herself the applicant, s. 3 of 35 & 36 Vict. c. 65, governing this stage of the proceedings, provides that she shall "either before the birth, or at any time within twelve months of the birth of the child," or any time thereafter, upon proof that the man alleged to be the father of such child, has, within the twelve months next after the birth of such child, paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceases to reside in England, within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which he may reside, for a summons to be served on the man alleged by her to be the father of the child"; it provides, also, that if the application be before the birth, then the woman's statement must be in the form of a sworn deposition. It is necessary that the residence, which gives jurisdiction to the justice to whom she applies, should be a *bona fide* residence—not necessarily a long or a settled residence, but certainly not one taken up "because people said if she came there she would have a

better chance" (*R. v. Myott*, 1863, 32 L. J. M. C. 138). The twelve months to which, as a rule, the woman is limited, ceases to run against her, so soon as she has made her application; the justice need not grant the summons at once; in his discretion, as, *e.g.*, when the defendant has no known address (*Potts v. Cambridge*, 1858, 27 L. J. M. C. 62), he may keep the application suspended (the "thereupon issue" of the Statute being interpreted not to mean immediately); but, in such a case, the justice who grants the summons must be the justice to whom the application is made; and if he die, no other magistrate, after the twelve months, may entertain the application (*R. v. Pickford*, 1861, 30 L. J. M. C. 133). An application made by the guardians on behalf of a child which has become chargeable, will not prevent the time running against the mother. As regards the absence of the alleged father, it may be noted that if he should have happened to leave England before the birth, the saving clause which, in the other event of his leaving *after*, prevents the twelve months from running against the mother, will not avail her. Where the application is made before the child's birth, the summons is not heard until after that event (s. 4 of 35 & 36 Vict. c. 65). The summons must have been served six days before the hearing; if he could not be found, then it must be proved that the summons was left "at his last place of abode," and "his last place of abode" has been held to mean, the very last place at which he was known to have lived (*R. v. Webb* [1896], 1 Q. B. 487); he may be known to be living over-seas, but unless it can be shown that he had a place of abode, other than "the last place of abode," the service will be good (*R. v. Farmer* [1892], 1 Q. B. 637).

The summons must be heard by two justices, or by a stipendiary, as the case may be. The appearance of the defendant cures any defect in the service of the summons. The mother is a competent witness; though, if she be a married woman, with a living husband, she herself cannot testify to the fact of non-access, though the onus of proving it lies on her (*Goodright v. Moss*, 1778, 2 Cowp. 594); but if the adultery was the cause of the bastard's birth, she may, and indeed to succeed must, give evidence. In every case the mother's evidence is required (s. 4 of 35 & 36 Vict. c. 65) to be "corroborated in some material particular by other evidence" (see CORROBORATION). Justices are to judge of whether a particular fact amounts to corroboration, and they also decide what is a "material particular." Corroboration of the actual fact of intercourse is not, as a rule, forthcoming; proof of opportunity, letters written by the man, conversations, cohabitation, keeping company after knowledge of pregnancy, payments for expenses of birth, have been accepted as corroboration. The date of the conception of the child is also of great importance, and some medical evidence is usually expected; and by this, and the general probabilities of the case, the Court is, as a rule, guided; but the topic of the limits of the period of gestation belongs to medical jurisprudence. The applicant may be cross-examined as to her conduct with other men; but her cross-examiner is bound by her answers, except as to those of them which deny questions tending to show that another person is the father of her child; in that respect, witnesses may be called to contradict her. Here it may be said, however, that the defendant cannot escape his responsibility by trying to show that another man, equally well with himself, may have been the father. As the proceeding is not "criminal" (*R. v. Berry*, 1859, Bell's C. C. 47), the defendant, on his part, is a competent, and even a compellable, witness; he may be called for the mother, and in order to corroborate her. The Court, if the case is made

out, can award any weekly payment of not more than five shillings a week, and this remains payable until the child is thirteen years old; but the Court has power, by special order, to extend the period to sixteen years; the order operates from its date; but if the application was made within two months of the date, then the payment may be made to commence from the birth. The Court may also add a sum for expenses, medical and other, incidental to the birth. If the child has died, a sum may be allowed for the costs of the funeral. The Court has power over the costs, and may give costs to the defendant if he is successful.

Though the applicant fail, she is not, as a rule, precluded from renewing her application, and presenting fresh evidence, if she be in time. If the case has been decided upon the merits, she must make a fresh application; but if the case was decided against her, without regard to the merits, her original application will still avail her. The defendant, in his turn, may appeal to Quarter Sessions, if he gives notice in time, and can give security for costs; but the order remains in full force to the hearing of the appeal. At Quarter Sessions, the mother's case is first heard, the appeal being in every way a rehearing, and both parties being entitled to adduce new evidence. The Court may quash or vary the order. See APPEALS TO QUARTER SESSIONS.

Matters of law arising either at the hearing, in the first instance, or at Quarter Sessions, are decided by the Queen's Bench Division. The magistrates have power to state a special case. Either of the parties may obtain a rule nisi, or, in questions of jurisdiction, may proceed by *certiorari* (*q.v.*). On application made by guardians, the law and procedure differs but little; the guardians act under 35 & 36 Vict. c. 65, s. 7, and 36 Vict. c. 9, s. 5, in cases where bastards become chargeable to a parish or union; there is, however, this exception, that the guardians are entitled to take steps at any time against the alleged father. Also, the woman cannot avail herself of a successful application by the guardians in order to make a case for herself; nor is she prejudiced by this failure. See APPEALS TO DIVISIONAL COURTS.

The statutes are—7 & 8 Vict. c. 101; 8 Vict. c. 10; 35 & 36 Vict. c. 65; 36 Vict. c. 9.

[See Sanders, *The Law and Practice of Orders of Affiliation*; Bott's *Manual of the Law and Practice of Affiliation Proceedings*.]

Affinity.—Affinity is sometimes said to be of three kinds: (1) *Direct*, or that which subsists between the husband and the wife's blood relations, or between the wife and the husband's blood relations; (2) *Secondary*, or that which subsists between the husband and the wife's relations by marriage; and (3) *Collateral*, or that which subsists between the husband and the relations of the wife's relations. The affinity which bars marriage is only of the first or direct kind. The kindred of the husband are not of affinity to, the kindred of the wife, for affinity, as respects the wife's kindred, relates only to the husband, and terminates with him; and, as respects the husband's kindred, relates only to the wife, and terminates with her.

By 32 Hen. VIII. c. 38, it was enacted that "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees."

Archbishop Parker, in 1563, acting under royal authority, set forth the "Table of Kindred and Affinity" which is generally printed with the Book of

Common Prayer, though not a part of the "book annexed" to the Caroline Act of Uniformity (14 Car. II. c. 4). The table has full synodal authority by Canon 99 of 1603, which orders it to be publicly set up in churches. It has always been regarded as conclusive by the temporal Courts (*Hill v. Good*, 25 Car. II., Vaugh. 302; *R. v. Chadwick*, 1847, 11 Q. B. 205). Before 31st August 1835, when the Marriage Act, 1835, 5 & 6 Will. IV. c. 54, better known as "Lord Lyndhurst's Act," passed and came into operation, the state of the law was as follows. Any *de facto* marriage was presumed to be good, and could only be declared null and void by the proper ecclesiastical Court during the lifetime of both parties. The reason of this limitation, which the temporal Courts enforced by prohibition, was that, as the Ecclesiastical Court could only act *pro salute animæ*, it would not be allowed to proceed merely to bastardise the innocent issue. But it could, nevertheless, sentence the surviving partner of the incestuous union to penance (*Ray v. Sherwood*, 1836, 1 Curt. 193). By the Marriage Act, 1835, s. 2, all marriages thereafter celebrated between persons related within the prohibited degrees, whether of consanguinity or affinity, are "absolutely null and void to all intents and purposes whatsoever."

Notwithstanding this enactment, the High Court will grant a decree of nullity on the application of one of the parties (*Andrews v. Ross*, 1888, 14 P. D. 15). The capacity to contract marriage depends on the law of the party's domicile; and therefore persons of English domicile related within the prohibited degrees cannot, by going through a marriage ceremony in a country where such a marriage is legal, contract a valid marriage (*Brook v. Brook*, 1861, 9 H. L. 193).

Conversely, it would seem that a marriage, duly contracted according to the *lex loci contractus*, between persons who, by the law of their domicile, are under no incapacity to intermarry, will be held good in England, although the English law imposes an incapacity. See *Sottomayer v. De Barros*, 1877, 3 P. D. 1. But the child of such a marriage could not inherit real estate in England. See *Fenton v. Livingstone*, 1859, 3 Macq. H. L. 497. These questions are of practical importance, owing to the legalisation in some civilised countries (including several British dependencies) of certain marriages prohibited in England on the ground of affinity, and of the frequent attempts, since the year 1849, to legalise one particular form of such marriages in England. Into a point on which public opinion is sharply divided, and which touches on theological and social considerations, it would obviously be outside the province of such a work as the present to enter. It may, however, be permissible to observe that the English law, as it stands, is logical and symmetrical, and on no intelligible principle could any prohibition grounded on affinity remain, if marriage with a deceased wife's sister were made legal. Mere illicit connection does not constitute affinity (*Wing v. Taylor*, 1861, 2 Sw. & Tr. 278).

[See Pollock and Maitland, *History of English Law*, ii. 385; Gibs. *Codex*, i. 408; Phillimore, *Ecc. Law*, 2nd ed., 563; Hammick, *Marriage Law of England*, 31; Dicey, *Conflict of Laws*, 626; Bishop, *Marriage and Divorce*, i. s. 730.]

Affirmation.—In all places and for all purposes where an oath is required by law, any person may make an affirmation who either—

(a) Is or has been a Quaker or Moravian (3 & 4 Will. IV. c. 49; 1 & 2 Vict. c. 77), or

(b) Upon objecting to being sworn states as the ground of his objection.

either (1) that he has no religious belief, or (2) that the taking of an oath is contrary to his religious belief (51 & 52 Vict. c. 46, s. 1; and see *R. v. Moore*, 1892, 61 L. J. M. C. 80; *Nash v. Ali Khan*, 1892, 8 T. L. R. 444).

An affirmation made under any of these statutes has the same force and effect as an oath, and any person making it wilfully, falsely, and corruptly, is guilty of perjury.

The form of affirmation given in the Oaths Act is as follows:—"I, A. B., do solemnly, sincerely, and truly declare and affirm."

If the affirmation is in writing, it begins:—"I of do solemnly and sincerely affirm;" and the form in lieu of jurat is "Affirmed at this day of 18 , before me."

Afforatus.—Blount and other authorities explain this word to mean appraised or valued, and cite by way of example things vendible in a fair or market. In old charters the word is also sometimes found in connection with words signifying penalties or fines in the sense of liquidated or ascertained in respect of amount.

Afforciare.—To add to, increase, or make stronger, especially of enlarging the number of witnesses or jurymen when those called happen to be nearly equally divided in opinion or contrary in their oaths. See Bracton, lib. 4, c. 19. *Afforciamentum curiæ* is the summoning of a Court on some solemn or special occasion.

Affray is the fighting of two or more persons in a *public* place to the terror (*à l'effroi*) of the lieges. It is an indictable misdemeanour, for which no specific punishment is limited by statute (Stephen, *Dig. Crim. Law*, 5th ed., art. 74; 3 Co. Inst. 158; Hawk., P. C., bk. ii. s. 63; 1 Russ. on *Crimes*, 6th ed., 587; Arch. Cr. Pl., 21st ed., 965; Mayne, *Criminal Law of India*, 1896, 491). Prosecutions for the offence are rare, because upon the same facts the persons concerned usually render themselves liable to prosecution for ASSAULT (*q.v.*), RIOT (*q.v.*), or UNLAWFUL ASSEMBLY. See ASSEMBLY, UNLAWFUL. A private person is entitled (Hawk. P. C., bk. i. c. 63, s. 11), and constables and justices are bound to interfere to put a stop to an affray (see 1 Russ. on *Crimes*, 6th ed., 589-592, and *R. v. Pinney*, 1832, 3 St. Tri. N. S. 1, as to the duties and liabilities of justices where the public peace is disturbed).

Affreightment.—Affreightment is a contract by which a shipowner undertakes to carry goods in his ship for reward. The person for whom the goods are carried is called the *freighter*, and the sum which he pays for their carriage is called the *freight*. The contract may be made (1) between the shipowner and one person who hires the use of the ship, for the purpose of carrying his own goods or those of other persons; or (2) between the shipowner and each of a number of persons who ship goods in that particular ship. In the former case, the contract is generally expressed in a *charter-party*, and the ship is called a *chartered* ship; in the latter, the ship is called a *general ship*, and the contract is generally expressed in writing, and called a *bill of lading*. These two contracts are considered in detail under CHARTER-PARTY and BILL OF LADING. The present article only deals with the general principles common to both contracts of affreightment

like, such as (a) the liability of a shipowner who receives goods for carriage in his ship without making any express conditions; (b) the law governing both contracts of affreightment; (c) the rules of construction applicable to all express contracts of sea carriage.

(a) *Liability of Shipowner apart from Express Conditions.*—It is hardly necessary to say that in practice the shipowner's liability is chiefly determined by a contract, limiting very narrowly, by its express exceptions, the contract which the law would imply from the fact of goods being accepted for carriage in a ship. These exceptions are best considered under their respective contracts. But, as no number of express exceptions can be exhaustive, the liability of a carrier by sea must at times depend on what is his legal position, unqualified by special conditions. That position depends on the common law and various statutes.

The liability of a shipowner or shipmaster at common law is thus stated by Lord Holt (in *Coggs v. Bernard*, 1703, 1 Smith's L. C.): "As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods in all events. And this is the case of the common carrier, common hoyman, master of a ship, etc., which case of a master of a ship was first adjudged, 26 Car. 2, in the case of *Morse v. Slue*, Raym. (Ld.) 220. The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the king." In *Morse v. Slue* (1671), goods which had been shipped in a vessel lying in the Thames, to be carried to Cadiz, were forcibly taken out of her by robbers before the ship sailed, and Chief-Justice Hale held the master liable for them, although no negligence was proved against him, and he had the usual number of men to guard the ship, saying that there was no difference between his liability in that case and that of a common carrier. The ship seems to have been a general ship; as it was the case of *Barclay v. Cuculla y Gama* (1784, 3 Doug. K. B. 389), where, under the same circumstances as those in *Morse v. Slue*, Lord Mansfield had a similar judgment; and in *Dale v. Hall* (1750, 1 Wills. 281), where a shipmaster or keelman who carried goods for hire from port to port was held liable for damage to goods done on the voyage, not due to any negligence of his, it is not clear if there were other shippers besides the plaintiff. From the above authorities, confirmed in *Nugent v. Smith* (1875, 1 C. P. D. 25 and 427), there is no doubt that the owner of a general ship is either a common carrier or has the same liability as one, if his ship plies regularly between fixed places and habitually carries the goods of all-comers, whether within or without English waters, and probably is so, if his ship is announced to carry goods for hire, for all persons who may offer on a particular voyage, i.e. is put up as a general ship.

Whether the owner of a chartered ship, i.e. one carrying goods for one person exclusively, has the same liability as the owner of a general ship, is a disputed question, and there have been conflicting judicial opinions. The only case in which the point can be said to have directly arisen is *Liver Alkali Co. v. Johnson* (1874, L. R. 9 Ex. 338); there a barge-owner let out his vessels for conveyance of goods to any customer who applied to him; each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage; the owner did not ply between fixed termini, but the customer fixed in each case the points of arrival and departure; and it was decided that the owner was liable for the loss of goods as a common carrier. Blackburn, J., in that case said:

"It is difficult to see any reason why the liability of a shipowner who engages to carry the whole lading of his ship for one person should be less than the liability of one who carries lading in different parcels for different people," adding that the liability of a lighterman was expressly recognised as being the same as that of a common carrier. Brett, J. (now Lord Esher, M. R.), stated it as his opinion, on a review of the authorities, that shipowners, though not common carriers, yet by custom, *i.e.* the common law of England, have the same liability. "Every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own risk, the act of God and the Queen's enemies alone excepted, unless by agreement between himself and the particular freighter on the particular voyage he limits his liability by further exceptions." In *Nugent v. Smith* (*ante*) he repeated this opinion: "Every shipowner or master who carries goods on board his vessel for hire is, in the absence of express stipulation to the contrary, subject by implication, by the common law of England adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God and the Queen's enemies. It is not only such shipowners as have made themselves in all senses common carriers who are so liable, but all shipowners who carry goods for hire, whether inland, coastwise, or abroad, outward or inward." When this case was taken to the Court of Appeal, Cockburn, C. J., dissented emphatically from the theory and doctrine put forward by Brett, J., saying that all jurists who treated of this bailment carefully distinguished between the common carrier and the private ship, and that he disapproved of the decision in *Liver Alkali Co. v. Johnson* (*supra*). Historically, it would seem that this liability of carriers is derived from the early English law and not from the Roman law (Holmes, *Common Law*, lect. v.). If the shipowner has not the liability of a common carrier, because his ship is "private," he only undertakes to exercise ordinary care and diligence in carrying the goods, and is only liable for negligence of himself or his servants. But in *Hamilton v. Pandorf*, (1886, 17 Q. B. D. 683), Bowen, L. J., says: "By the common law of this country, which in this respect is stricter than either the civil law or the law of many continental nations, a carrier at sea was liable for loss or damage to goods, except only in the event of accidents caused by the act of God or of the king's enemies." It seems, therefore, that the balance of authority and principle is in favour of the view taken by the present Master of the Rolls (see Willes, J., in *Notara v. Henderson*, 1872, L. R. 7 Q. B. 236; Abbott, pp. 369, 469, and 70; Carver, p. 7).

The exceptions to the strict rule of liability of the shipowner implied by common law are the following:—(a) Loss caused by the *act of God* (*q.v.*), which is a "mere short way of expressing this proposition—a common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him" (James, L. J., *Nugent v. Smith*, above), such as lightning, storm (Martin, B., *Oakley v. Portsmouth and Ryde U.S.P.C.*, 1856, 25 L. J. Ex. 99), or frost (Carver, ss. 8, 9, and 10). (b) Loss caused by the *Queen's enemies*, *i.e.* any loss caused by the act of States or peoples at war with this country in the case of a British ship, and where the ship is foreign probably loss caused by enemies of the State to which the ship belongs. Both this and the foregoing exception are usually expressly mentioned in the contract of affreightment (and perhaps this is necessary if the shipowner is not a common carrier, Willes, J., *Lloyd v. Guibert*,

1865, L. R. 1 Q. B. 121), and an express exception of *Queen's enemies* has been held to include enemies of a foreign State to which the ship belonged (*Russell v. Niemann*, 1864, 34 L. J. C. P. 10). (c) Loss caused by the inherent defect of the goods themselves, e.g. a horse injured by its own timidity (*Nugent v. Smith*, above); or owing to the defective packing of the goods, or the dangerous nature of the goods, of which the shipowner has not notice (*Hutchinson v. Guion*, 1868, 28 L. J. C. P. 63), and it has been decided that it makes no difference whether the shipper of the goods knows of it or not (*Brass v. Mailland*, 1856, 26 L. J. Q. B. 49); but there are judicial and other opinions that the shipper should not bear the loss where he is ignorant of the defective or dangerous nature of his goods (*Acatos v. Burns*, 1878, 3 Ex. D. 282; Carver, ss. 277, 278). (d) Loss by jettison, or voluntary sacrifice of goods for the general safety of the adventure (*Mouse's Case*, 1608, 12 Coke, 63), though the shipowner contributes in general average, unless they are deck cargo and carried at merchant's risk (*Roy. Ex. A. C. v. Dixon*, 1887, 12 App. Cas. 11). None of these exceptions will, however, protect the shipowner if he has not "taken reasonable care to avoid the cause of loss, or guard against its possible effects, or arrest its consequences" (Carver, s. 16); for, in spite of the exceptions, his contract is to carry with reasonable care (*The Xantho*, 1887, 12 App. Cas. 510, Lord Herschell, approving Willes, J.'s statement in *Grill v. General I. S. C.*, 1866, L. R. 1 C. P. 612; *Hamilton v. Pandorf*, 1887, 12 App. Cas. 526, Lord Watson). Thus a fire arising by act of man, which spread from a distance to the place where the goods were and destroyed them, is not an act of God, though fire naturally caused is (*Forward v. Pittard*, 1785, 1 T. R. 27; 1 R. R. 142, Lord Mansfield); nor is a frost which made a boiler burst because it had been carelessly filled with water the day before (*Siordet v. Hall*, 1828, 4 Bing. 607). Similarly, a master is bound to avoid the public enemies of his country; and is justified in delaying or putting into a neutral port for safety, or the exception "*Queen's enemies*" will not protect him (*The Teutonia*, 1870, L. R. 4 P. C. 171). Though the shipowner is not liable for loss caused by inherent defect of the goods, yet, if the consequences of that defect have been aggravated by the way in which he or his agents have stowed them, he will be responsible (*The Freedom*, 1869, L. R. 3 P. C. 594), although the shipper knows and assents to that method of stowage (*Hutchinson v. Guion*, ante), unless the stowage is well done and in a way approved of by the shipper, and the master is reasonably ignorant of the effect likely to be produced by such stowage (*The Helene*, 1866, L. R. 1 P. C. 239). So, if he has notice of the defective packing of goods, he may be bound to remedy it so far as he reasonably can if he chooses to carry them on; and if he insists on carrying on to its destination a cargo which is found at an intermediate port to be deteriorating from sea damage, instead of landing it and taking steps to stop the damage, he is liable for the increased damage so caused (*Notara v. Henderson*, above); and if he has notice of the dangerous nature of the goods which he accepts on board his ship, loss arising thence must be made good by the shipowner (*Acatos v. Burns*, ante; Carver, s. 279). This rule applies to express exceptions as much as to implied ones.

The shipowner also impliedly warrants that the ship is seaworthy at the beginning of the voyage, i.e. is fit in structure, condition, and equipment for carrying the cargo on the agreed voyage in safety (*Steel v. State Line S. S. Co.*, 1877, 3 App. Cas. 72); e.g., if the cargo is one of frozen meat, the refrigerating machinery must be in proper condition (*The Maori King* [1895], 2 Q. B. 550). This warranty is not "because he is a common carrier (i.e. only where he is such), but because he is a shipowner" (*Kopitoff v.*

Wilson, 1876, 1 Q. B. D. 382); and it extends even to latent defects in the ship not discoverable by careful examination, though everything reasonable has been done to make her seaworthy (*The Glenfruin*, 1885, 10 P. D. 103). It does not apply to any time subsequent to the ship's sailing (*The Rona*, 1884, 51 L. T. 28), after which the shipowner is only liable for loss arising from unseaworthiness due to a cause for which he is liable; so that he will be liable (1) when the ship is unseaworthy at the beginning of the voyage (*Gilroy v. Price* [1893], App. Cas. 56), and, if the voyage is in stages, at the beginning of each stage (*Thin v. Richards* [1892], 2 Q. B. 141); (2) when she becomes so during the voyage from a cause for which he is liable by the contract, whether he has the opportunity to repair it or not (*Worms v. Storey*, 1855, 11 Ex. Rep. 427); (3) when she becomes so owing to a cause for which he is not liable by the contract, if he has the power to repair and fails to do so (*Cohen v. Davidson*, 1877, 2 Q. B. D. 455; *Notara v. Henderson*, above). The shipowner also impliedly contracts that his ship is in a proper condition to receive the cargo when put on board (*Tattersall v. National S. S. Co.*, 1884, 12 Q. B. D. 297), and that she will prosecute her voyage with reasonable despatch and without unnecessary deviation (*Leduc v. Ward*, 1888, 20 Q. B. D. 475; *Scaramanga v. Stamp*, 1879, 4 C. P. D. 316, and 5 C. P. D. 295).

There is an implied exception in the shipowner's favour, that the contract is a legally possible one: thus, in the case of a British ship, if the execution of the contract is made illegal or impossible, and loss be caused thereby owing to the act of the British Government, whether it was so originally or only became so afterwards, he is not liable (*Esposito v. Bowden*, 1857, 27 L. J. Q. B. 25); and in the case of a foreign ship, he is similarly discharged if an act of the State to which the ship belongs makes the contract illegal (*The Teutonia*, above). But in neither case is he exempted if its performance is prevented by the act of a Government other than his own (*Spence v. Chadwick*, 1847, 16 L. J. Q. B. 313), or by unauthorised acts of the officers of his own Government or any other (*Gosling v. Higgins*, 1808, 1 Camp. 451; 10 R. R. 726; *Evans v. Hutton*, 1842, 12 L. J. C. P. 17).

Certain exemptions are also given to the shipowner by statute. He is not liable for any loss happening without his actual fault or privity, and caused by fire on board his ship, or by robbery or embezzlement, making away with or secretion of any gold, silver, diamonds, watches, jewels, or precious stones put on board, unless the owner or shipper has declared in the bills of lading or other writing the true nature and value of these articles (M. S. A., 1894, s. 502); and a description in a bill of lading as "a box containing about 248 ounces of gold dust" has been held not to be enough to make the shipowner liable (*Williams v. African S. S. Co.*, 1856, 25 L. J. Ex. 69). The measure of his total liability is also limited, in case of losses happening to any goods on board the ship without his actual fault or privity, to £8 for each ton of the ship's tonnage; until 1862 the limit had been the value of the ship and freight (M. S. A., 1854, ss. 504 and 505; altered by M. S. A., 1862, s. 54, now M. S. A., 1894, s. 503); and he is exempted from all liability for damage caused by the actual fault or incapacity of any qualified pilot, acting in charge of a ship where the employment of such pilot is compulsory by law, in collisions between ships (M. S. A., 1894, s. 633). See COLLISION and PILOT. Railway companies which act as sea-carriers, either with their own steamers or those of other persons, are liable for loss of or injury to animals, or any articles, goods, or things, in spite of any notice limiting their liability, unless a special contract is made, signed by the owner of the goods, and held by a Court to be just and reasonable. Their total liability is limited, like that of

other shipowners; and in the case of animals a certain sum per head is fixed as the limit recoverable, and no excess is recoverable unless declared and additionally paid for by the shipper (Railway and Canal Traffic Act, 1854, s. 7; Railways Regulation Acts, 1868, s. 16; 1863, s. 31; 1871, s. 12; *Cohen v. S. E. R. Co.*, 1877, 2 Ex. D. 253; *Doolan v. Midland R. Co.*, 1877, 2 App. Cas. 92). But see s. 14, Act of 1868.

Other statutory provisions, dealing generally with shipment of goods, are the following:—No goods of an explosive or dangerous character are to be shipped without notice of their character given to the shipowner, under a penalty (M. S. A., 1894, ss. 446–450); and a master may require any packages which he suspects contain explosive goods, to be opened or to be searched for, without being subject to any liability (M. S. A., 1894, ss. 446–450; Explosives Act, 1883, s. 8). No ships are to carry timber cargoes on deck during the winter to any port in the United Kingdom from any port without it, under penalties (M. S. A., 1894, s. 451). Ships carrying grain cargoes in bulk must be loaded with proper precautions to prevent the grain from shifting; and in the case of ships loading grain at a port in the Mediterranean or Black Sea, or on the coast of North America, statutory requirements in this respect must be complied with, and notice given of the kind and quantity of cargo to the British consular officer or customs officer, as the case may be (M. S. A., 1894, ss. 452–456).

(b) *Law applicable to Contracts of Affreightment.*—In contracts of affreightment a different rule is followed from that in ordinary commercial contracts on this point. In the latter, the general rule is that the law of the place where the contract was made (*lex loci contractus*) governs the contract, or, if the contract is made in one country but is to be performed in another, the law of the place of performance decides its effect (*Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. 600, Bowen, L. J., quoting Lord Mansfield in *Robinson v. Bland*, 1760, 1 Black. W. 258; *Chatenay v. Brazilian Co.* [1891], 1 Q. B. 79, Lord Esher, M. R.). With regard to contracts of sea-carriage, on the other hand, if they contain nothing to show, either expressly or by implication, what law they intend to adopt, the established rule is that the *law of the flag* under which the ship sails determines the nature of the shipowner's liability. "The general rule that, where the contract of affreightment does not provide otherwise, then, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most convenient to those engaged in commerce" (*Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 123, Willes, J.). In that case the shipowner and ship were French, the charterer was a British subject, and the vessel was chartered at St. Thomas, a Danish island in the West Indies, to load a cargo at Hayti for Liverpool; in the course of the voyage the ship had to put into Fayal, a Portuguese port, in order to repair sea damage, and the master bottomried the ship freight and cargo for the expenses of the repairs. The vessel arrived at Liverpool, but the value of ship and freight fell short of the amount of the bottomry bond, and the cargo-owner had to pay the balance. On his claiming to recover it from the shipowners, it was decided that they were not liable, because by French law (the law of the flag) they were exempted from further liability, though by Danish, Portuguese, or English law they would have been liable. Similarly, in *Re Missouri S. S. Co.* (1889, 42 Ch. D. 321), a contract made in the United States between an American citizen and a British company of shipowners; to carry cattle from Boston to England in an English ship, by which the shipowners were not to be liable for

negligence of the master and crew, was held to be governed by English law, which allowed this exception, and not by American law, by which it was void. The law of the flag also determines what authority the contract of affreightment gives to the master over the goods intrusted to him; and "any person who ships goods in a foreign ship is held to impliedly authorise the master of the ship to deal with them according to the law of the flag, unless he limits that authority by express stipulation at the time of the agreement" (*The Gaetano v. Maria*, 1882, 7 P. D. 137; Brett, L. J.; *The August* [1891], Prob. 328). And the law of the flag not only construes the contract as expressed, but it also determines the obligations which are to be implied in it consistently with the written terms. As far as regards the manner of performing the contract is concerned, the law of the place where the contract is to be performed must be complied with; but it is not allowed to alter the express terms of the contract as interpreted by the law of the flag, and excuse its non-performance (*Moore v. Harris*, 1876, 1 App. Cas. 331; *Jacobs v. Crédit Lyonnais*, above). On the other hand, if the contract contains anything to show, by expression or implication, that the parties did not intend the law of the flag to govern it, but some other law, the latter will be the governing law; *The Wilhelm Schmidt*, 1871, 25 L. T. 34, where Sir Robert Phillimore applied the law of the place of delivery; *Chartered Bank of India v. Netherlands India S. N. Co.*, 1882, 10 Q. B. D. 521, where an English bill of lading, signed at Singapore for goods belonging to an English shipper carried in a ship flying the Dutch flag, but beneficially owned by Englishmen, was held to be governed by English law, Brett, L. J., saying: "It may be true in a sense to say that where the ship carries the flag of a particular country, *prima facie* the contract made by the captain of that ship is a contract made according to the law of the country whose flag the ship carries. But that is not conclusive. The question what the contract is and by what rule it is to be construed is a question of the intention of the parties, and one must look at all the circumstances and gather from them what was the intention of the parties." And it has also been held by the same learned judge, in the Court of Appeal, that the law of the flag may not be intended to govern the meaning of the contract as between the parties, though it governs the relation of the master to the cargo intrusted to him (*The Industrie* [1893], Prob. 58).

Where a through contract for the carriage of goods, partly by land and partly by sea, from one country to another, is entered into, perhaps a different law applies to each stage of the contract, the land stage being subject to the law of the country through which it passes, the sea stage to the law of the flag (*Cohen v. S. E. R. Co.*, above, where it was left an open question whether a contract, made by a passenger taking a ticket at Boulogne for London *via* Folkestone, and broken by her luggage being damaged by the railway servants' carelessness in Folkestone harbour, was to be governed by French or English law).

The validity of an ordinary contract, in point of *form* and *capacity of parties*, depends on the law of the place where it was made, while the manner of proving it, and its effect as evidence, depends on the law of the Court which is asked to enforce it (*lex fori*) (*Leroux v. Brown*, 1852, 22 L. J. C. P. 1); in a contract of affreightment, it seems that if the law of the flag is satisfied as to the validity of the contract, that is enough (Carver, s. 213).

The *legality* of the contract of affreightment will no less depend on the law which the parties intended to adopt, whether it be that of the flag or

any other, but its enforceability will depend on whether it is illegal by the *lex fori*. In England, a contract cannot be enforced, wherever it has been made, if it is forbidden by English law (*Rousillon v. Rousillon*, 1880, 14 Ch. D. 369); but it can be enforced (1) if it is valid in the country where it is made, whether valid or void here; (2) if it is valid in the country where it is to be performed, whether it be valid or void here, and whether it is made here or elsewhere; (3) if it is void in the country where it is made, but is valid here (*Missouri* case, above); and (4), though this is contrary to the principle of international comity, if in the country where it is made or is to be performed, it is illegal by revenue laws (*Planché v. Fletcher*, 1779, 1 Doug. 251, Lord Mansfield; *Pellicat v. Angell*, 1835, 2 C. M. & R. 311).

[See Carver, *Sea Carriage*, ch. i., vi., vii., and ix.; Scrutton, *Charter-Parties*, ss. 1, 3, 6; and Abbott, *Shipping*, part iii. ch. ii. and iv.]

(c) *Construction of Contract of Affreightment*.—The ordinary rules of construction applicable to commercial contracts govern contracts of affreightment, and may be summarised as follows:—The written contract, if clearly and unambiguously expressed, governs the rights of the shipowner and shipper *inter se*, and its provisions cannot be contradicted or qualified by evidence of what had previously passed between the parties, or of a different intention than that which appears from the document, unless there has been misrepresentation or joint-mistake, or the contract is not complete (*Leduc v. Ward*, ante). If there are indefinite or ambiguous terms in it, evidence is admissible of the meaning probably attributed to them by the parties, which can be inferred from the relations between the parties, the subject of the contract, and the object which it had in view. The canon for ascertaining the meaning of the words used is that stated by Lord Ellenborough: "They are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the contract evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense" (*Robertson v. French*, 1803, 4 East, 136; 7 R. R. 535). If any word has a technical or special meaning by custom of trade, evidence is allowed to show what it is, though the word has an ordinary unambiguous and actual meaning, and thus geographical terms may be shown to have a commercial meaning not corresponding to their strict geographical meaning (*Birrell v. Dryer*, 1884, 9 App. Cas. 353); and where both parties are engaged in the same trade, the presumption is that they meant to use the word in the sense in which it is specially understood in that trade (*Myers v. Sarl*, 1860, 30 L. J. Q. B. 16). When evidence of a customary meaning is given, it is for the Court to say whether it is sufficient to go to the jury, the jury find as a question of fact whether the custom is established or not, and "the Court, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of any custom of the trade to any of the words of that contract, has to place the construction upon the contract," *i.e.* decide its meaning (*Bowes v. Shand*, 1877, 2 App. Cas. 472, *per* Lord Cairns). Exceptions introduced in favour of a party are construed most strictly against him, and their extent is determined on this principle (*Burton v. English*, 1884, 12 Q. B. D. 218; *Norman v. Binnington*, 1890, 25 Q. B. D. 477). The meaning of a clause is to be interpreted so as to give effect, if possible, to the whole document; and if one part of it is in conflict with the tenor of the whole, it

must be disregarded (*Hydarnes S. S. Co. v. Mutual Indemnity Insur. Assoc.* [1895], 1 Q. B. 500). The intention of the parties is strictly followed; and on this account it has been stated, as a rule, that printed parts of a contract give way to the written parts of it, if not reconcilable with them, though the decisions only apply the rule to policies of insurance (*Robertson v. French*, above; *Baumwoll v. Furness* [1891], 2 Q. B. 317, Charles, J.); and the safer rule seems to be, that the whole tenor of the contract decides, and print and writing must be construed together (*Baumwoll v. Furness* [1892], 1 Q. B. 253).

Terms may also be imported into written contracts by law; e.g. it is an implied condition in every contract of affreightment that it shall be performed in a reasonable manner and with reasonable diligence, "reasonable" in this connection meaning what is reasonable under the actual circumstances and not under ordinary ones, and being determined by the ordinary practice in the particular trade with reference to which the contract is made. Custom may also import terms into the contract, as well as interpret those expressed in it; and as it is presumed to be known by all persons in the trade, it will bind them though they are actually ignorant of it. Similarly, a person employing an agent to do business for him in a particular trade impliedly authorises him to contract according to the known customs and practices of that trade, but not if such customs be inconsistent with the real character of the agency, or unfair to the principal, and are only known within that trade (*Robinson v. Mollett*, 1869, L. R. 7 H. L. 802; *Bartlett v. Pentland*, 1830, 10 Barn. & Cress. 770). A custom, in order to be importable into a contract, must be (1) reasonable (*Sweeting v. Pearce*, 1860, 30 L. J. C. P. 109); (2) certain and universally adopted (*Nelson v. Dahl*, 1879, 12 Ch. D. 575); (3) consistent with the contract (*Hayton v. Irwin*, 1879, 5 C. P. D. 130), and the words "as customary," added in writing in a charter-party, are not allowed to introduce a custom which is directly at variance with the printed terms (*The Nifa* [1892], Prob. 411); (4) consistent with law (*Atwood v. Sellar*, 1880, 5 Q. B. D. 286); (5) concerned with the subject of the contract (*Phillips v. Briard*, 1856, 25 L. J. Ex. 233). Local customs and special local meanings of words cannot be imported into the contract, unless well known to persons engaged in the trade at the place where the contract is made (*Holman v. Peruvian Nitrate Co.*, 1878, 5 Sess. Ca., 4th ser., 657; *Buckle v. Knoop*, 1867, L. R. 2 Ex. 125). But where a contract is made in one place to be performed at another, it is presumed that it is meant to be performed in a reasonable manner, having regard to the practice prevailing at the latter, whether the parties know that practice or not (*Norden S. S. Co. v. Dempsey*, 1876, 1 C. P. D. 654; *Marzetti v. Smith*, 1884, 49 L. T. 580). A local custom which may be presumed to be known to an original party to the contract, e.g. the original holder of a bill of lading, will not bind a subsequent party to it, e.g. an assignee who has no notice of it (*Kirchner v. Venus*, 1859, 12 Moo. P. C. 361; *Buckle v. Knoop*, above).

Africa.—For the law relating to British colonies in Africa, see under COLONY, and special articles, CAPE OF GOOD HOPE, NATAL, ETC. See also CHARTERED COMPANY; PROTECTORATE; SPHERE OF INFLUENCE. The territories belonging to other powers, or lying within their spheres of influence, are beyond the scope of this work; but see under EGYPT, the legal position of British authorities in that country. The South African Republic is an independent State, though its foreign relations are controlled to some extent by Great Britain.

After.—Where an act has to be done within so many days “after” a given event, the day of such event is not to be reckoned, and the party to do the act has the whole of the last day of the prescribed time in which to do it (*Williams v. Burgess*, 1840, 12 Ad. & E. 635; *Robinson v. Waddington*, 1849, 18 L. J. Q. B. 250; and *Blunt v. Heslop*, 1838, 8 Ad. & E. 577; see *Stroud, Jud. Dict., in loc.* A devise “after,” or “from and after,” a previous interest is not by such words postponed in vesting (1 Jarm. 806 and 816; and see 2 Jarm. 517 and 522).

After-acquired Chattels.—See **BILLS of SALE.**

After-acquired Property.—See **BANKRUPTCY; BILLS of SALE; FUTURE AND AFTER-ACQUIRED PROPERTY.**

Against the Form of the Statute.—See **INDICTMENT.**

Against the Peace.—See **INDICTMENT.**

Age of Discretion.—The period fixed by law when an infant is presumed to become possessed of sufficient understanding to discriminate as to the moral quality of his acts, and therefore to be responsible for crimes committed by him. See **AGE, PRESUMPTIONS AS TO.**

Age, Presumptions as to.—Conclusive presumptions, that is, those which cannot be rebutted by evidence, are not easily distinguished from rules of substantive law. Thus the incapacity of infants to make contracts and deal with their own property is sometimes stated as a presumption of law, that they have not the capacity of mind requisite for such transactions, but may be more conveniently considered as substantive rules of the law of contract and property. (See **INFANTS.**) So of capacity to commit crime, it may be stated, either as a rule of law or as a conclusive presumption, that an infant under the age of seven years cannot be guilty of felony, or probably of misdemeanour (1 Hale, P. C., 27, 28; Blackstone, iv. 23; Stephen, *Dig. Crim. Law*, art. 26), and that a boy under the age of fourteen years cannot be guilty of a rape or an assault with intent to ravish, or of having carnal knowledge of a girl under the age of thirteen years (1 Hale, P. C., 630; *R. v. Groombridge*, 1836, 7 Car. & P. 582; *R. v. Phillips*, 1839, 8 Car. & P. 736; *R. v. Waite* [1892], 2 Q. B. 600; 61 L. J. M. C. 187; 67 L. T. 300; 41 W. R. 80; 17 Cox C. C. 554). He may nevertheless, in circumstances which in an adult would amount to one of these offences, be convicted of a common assault (*R. v. Phillips, supra*), or an indecent assault (*R. v. Williams* [1893], 1 Q. B. 320; 62 L. J. M. C. 69; 41 W. R. 332; 5 R. 186). There is a presumption which may be rebutted by evidence that an infant above the age of seven years and under the age of fourteen years is *doli incapax*. Yet if it appear to the Court and a jury that he was *doli incapax* and could discern between good and evil, he may be convicted and punished (Blackstone, iv. 23; Stephen, *Dig. Crim. Law*, art. 27; *R. v. Owen*, 1830, 4 Car. & P.

236). It is said that "the evidence of malice which is to supply age should be clear and strong beyond all doubt and contradiction" (Black. Com. iv. 24). There is no presumption of law regarding the age at which a woman is past the age of child-bearing. But the Courts have frequently presumed in fact, from the circumstances of particular cases, that women of various ages were past the age of child-bearing. The presumption has been made in the case of a married woman, 49½ years of age, who had never had a child (*In re Millner's Estate*, 1872, L. R. 14 Eq. 245; 42 L. J. Ch. 44; 26 L. T. 825; 20 W. R. 823); in the case of a childless widow aged 55½, and a spinster aged 53 (*In re Widdow's Trusts*, 1871, L. R. 11 Eq. 408; 40 L. J. Ch. 380; 24 L. T. 87; 19 W. R. 468); in the case of a spinster aged 54 (*Davidson v. Kimpton*, 1881, 18 Ch. D. 213; 45 L. T. 132; 29 W. R. 912); and in the case of a spinster aged 53 (*Haynes v. Haynes*, 1866, 35 L. J. Ch. 303; 14 L. T. 47; 14 W. R. 361); but in *Croxtan v. May*, 1878, 9 Ch. D. 388; 39 L. T. 461; 27 W. R. 327, the Court refused to presume that a woman of 54½ years who had never had any children, but had only been married three years, was past child-bearing.

Agency (Election).—The common-law doctrines as to the liability of a principal for the acts of his agent have, for the purposes of election law, been very considerably extended. It is clear that agency in election law is not the common-law relation of principal and agent, for a candidate may be responsible for the acts of one acting on his behalf, though the acts be beyond the scope of the authority given, or even in violation of express injunction (*Taunton*, 1874, 2 O'M. & H. 74; *Wakefield*, 1874, *ibid.* 102).

It appears, indeed, to present a stronger analogy to the relation of master and servant than to that of principal and agent (*Norwich*, 1869, 1 O'M. & H. 11; *Westminster*, 1869, *ibid.* 95; *Aylesbury*, 1886, 4 O'M. & H. 62), and the position of principal, in an electioneering sense, has in fact been compared by the judges with that of a man who employs others to race for him (*Westbury*, 1869, 1 O'M. & H. 55; *Tamworth*, 1869, *ibid.* 81; *Coventry*, 1869, *ibid.* 107; *Blackburn*, 1869, *ibid.* 202); or of the new owner of a yacht, who buys it to race in his name, and finds a captain and crew on board, the fact of his consenting to sail with them making them his agents for the purpose of sailing the race, in accordance with the laws of the course (*Wigan*, 1881, 4 O'M. & H. 11), and placing him under a liability in respect of acts done by them, even without his authority or knowledge, or in direct contravention of his orders (see *Westbury*, 1869, 1 O'M. & H. 55).

The Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, the Act which now governs the trial of election petitions, provides (s. 26) that the principles, practice, and rules on which election committees have heretofore acted in dealing with election petitions are, subject to the rules made under the Act, to be observed, so far as may be, in the case of election petitions under the Act.

Hence the liability of a candidate or member, as regards agency, has, in election petitions since the Act, been determined strictly in accordance with such principles, notwithstanding the rigour of their operation (*Coventry*, 1869, 1 O'M. & H. 107; *Taunton*, 1869, *ibid.* 185; *Blackburn*, 1869, *ibid.* 202). If, therefore, an agent commits a corrupt practice, e.g. by bribing voters, without the knowledge or direction of the candidate, the election is nevertheless rendered void, and the candidate will lose his seat. (As to the

consequences of corrupt and illegal practices by an agent, see CORRUPT PRACTICES; ILLEGAL PRACTICES; RELIEF.) It should, however, be observed that, in cases involving the liability of a member or candidate to a penalty at law, the common-law principles of agency are applicable in determination of the liability; in such a case, therefore, the knowledge and authority of the principal must be proved (*Felton v. Easthope*, 1822, reported in *Rogers on Elections*, 17th ed., vol. ii. p. 384), the law of agency which would subject a candidate to a penalty or an indictment being utterly different from that which would vitiate an election (see *per* Martin, B., *Norwich*, 1869, 1 O'M. & H. 10).

The liability of a candidate for the acts of his agent is very much the same as the liability of a Sheriff for the acts of his Under-Sheriff (*Bewdley*, 1869, 1 O'M. & H. 19), or of a master for the acts of his servant, whether lawful or unlawful, done in the course of his employment, notwithstanding that the particular acts in question may have been expressly prohibited (see *Wigan*, 1869, 1 O'M. & H. 191); for in parliamentary election law it has long been established that where a person has employed an agent for the purpose of procuring his election, he, the candidate, is responsible for the act of that agent in committing corruption, though he himself not only did not intend or authorise it, but even *bond fide* did his best to hinder it (*Taunton*, 1869, 1 O'M. & H. 182). The candidate is, therefore, liable for any illegal acts of his agent, or of a person acting under the authority of his agent, even where such acts are contrary to his express instructions (see *Middlesex*, 1804, 2 Peck. 32; *Norwich*, 1869, 1 O'M. & H. 10; *Bewdley*, 1869, *ibid.* 18; *Lichfield*, 1869, *ibid.* 26; *Bridgwater*, 1869, *ibid.* 115; *Taunton*, 1869, *ibid.* 182; *Barnstable*, 1874, 2 O'M. & H. 105). But to make a candidate liable for the acts of an agent, whose authority was limited to a particular transaction, it is necessary to show that the agent was acting within the scope of his authority (*Harwich*, 1880, 3 O'M. & H. 70; *Westbury*, 1880, *ibid.* 80).

Although, however, the sitting member is responsible for the corrupt act of his agent, committed contrary to his wish and direction, yet, where his agent commits an unauthorised act of corruption, under a treacherous agreement with the other side, it would not avoid the seat (*Stafford*, 1869, 1 O'M. & H. 230).

As to liability for the acts of a drunken agent, see *Day*, *El. Cas.* 64, and *Montgomery*, 1892, *ibid.* 151.

There has not been, and of necessity there cannot be, any precise definition of the degree of evidence requisite to establish such a relation between the candidate or the sitting member and the person guilty of corruption as will constitute agency (*Bewdley*, 1869, 1 O'M. & H. 17; *Bridgwater*, 1869, *ibid.* 115; *Taunton*, 1869, *ibid.* 185; *Taunton*, 1874, 2 O'M. & H. 73). Any person authorised by the candidate to act on his behalf in matters relating to the election is an agent; a man, indeed, may become an agent, not only by actual employment, but also by the recognition and acceptance of his services (see *per* Lush, J., *Harwich*, 1880, 3 O'M. & H. 70); moreover, a person proved to be an agent with general authority (nowadays the election agent), is not only himself an agent of the candidate, but also makes those persons agents whom he employs (*Bewdley*, 1869, 1 O'M. & H. 18).

As to what is sufficient to constitute a person an agent, it has been held that there is some evidence of agency whenever a person is in any way allowed by a candidate, or has the candidate's sanction, to try to carry on his election and to act for him, or where the candidate is proved

to have to some extent put himself in the hands of others, or to have made common cause with them for the purpose of promoting his election (see *per* Grove. J., *Taunton*, 1874, 2 O'M. & H. 74). A candidate is liable for the acts of any person whom he has put in his place to do a portion of his task, namely, to procure his election (*per* Field, J., *Aylesbury*, 1886, 4 O'M. & H. 62; see also *Shoreditch*, 1896). A mere volunteer, however, who gives his services without being asked, is not an agent, for every supporter of a candidate who chooses to canvass and to make speeches in his favour cannot force himself upon the candidate as an agent (*Ipswich*, 1857, Wolf. & D. 179; *Staleybridge*, 1869, 1 O'M. & H. 67; *Londonderry*, 1869, *ibid.* 278); nor does the mere fact of the candidate not interfering with persons acting in his support necessarily entail on him liability for any unlawful act of theirs of which he is ignorant (*Taunton*, 1874, 2 O'M. & H. 74). It is, moreover, clear that a person is not to be made an agent of the sitting member by his merely acting; that is not enough; he must act in promotion of the election, and he must have authority, or there must be circumstances from which authority can be inferred (*Stroud*, 1874, 3 O'M. & H. 11).

The employment of persons in business matters relating to the election, *e.g.* to attend meetings and speak on behalf of the candidate, to canvass, to bring voters to the poll, etc., may establish the relation of agency. This, however, is entirely a question of degree (see *per* Blackburn, J., *Hereford*, 1869, 1 O'M. & H. 195; *Hastings*, 1869, *ibid.* 219; *Worcester*, 1893, *Day's El. Cas.* 86; *Pontefract*, 1893, *ibid.* 131; *Lancaster*, 1896; *Shoreditch*, 1896); thus the butler of a candidate, though he had made certain payments in connection with the election (*Cockermouth*, 1853, 2 Pow. R. & D. 170), a person employed as a messenger only (*Windsor*, 1869, 1 O'M. & H. 3; *Durham*, 1874, 2 O'M. & H. 137), and one who, in fact, was merely a messenger, though nominally called a canvasser (*Bodmin*, 1869, 1 O'M. & H. 120), have been held not to be agents. Where the candidate hands money to an individual for election purposes, there is strong evidence that such person is an agent (*Galway*, 1857, Wolf. & D. 141; *Bevdley*, 1869, 1 O'M. & H. 18).

With regard to canvassing, it may be stated as a general rule that any person who is authorised by the candidate, or his agents, to canvass is an agent (*Penryn*, 1819, Corb. & D. 61; *Ipswich*, 1835, Kn. & O. 345; *Norwich*, 1869, 1 O'M. & H. 10; *Windsor*, 1869, *ibid.* 3; *Lichfield*, 1869, *ibid.* 25; *Stroud*, 1874, 3 O'M. & H. 11; *Harwich*, 1880, *ibid.* 70); general canvassing is in all cases strong evidence of agency (*Wigan*, 1881, 4 O'M. & H. 13). But the mere fact of accompanying the candidate on his canvass and canvassing in his presence, though it is strong evidence, is not of itself conclusive of agency (*Great Yarmouth*, 1860, Wolf. & B. 118; *Shrewsbury*, 1870, 2 O'M. & H. 36; *Salisbury*, 1883, 4 O'M. & H. 21); where, however, a person, in addition to canvassing with the candidate, also introduced people to him, who were then asked for their votes, it was held to be sufficient evidence of agency (*Rochester*, 1892, *Day's El. Cas.* 102). If the authority to canvass be limited either to particular voters, or to a particular class of voters, *e.g.* workmen employed by the canvasser, or to a particular district, the candidate will only be liable for acts within the scope of such limited authority (*Bodmin*, 1869, 1 O'M. & H. 120; *North Norfolk*, 1869, *ibid.* 237; *Durham*, 1874, 2 O'M. & H. 136; *Harwich*, 1880, 3 O'M. & H. 70; *Wigan*, 1881, 4 O'M. & H. 12).

The fact of being a member of a central or district committee, appointed for the conduct of an election, is evidence of agency (*Tynemouth*, 1853, 2 Pow. R. & D. 183; *Liverpool*, 1853, *ibid.* 250; *Nottingham*, 1843, Bar. &

Ann. 156; *Preston*, 1859, Wolf. & B. 72; *Dublin*, 1869, 1 O'M. & H. 272; *Wakefield*, 1874, 2 O'M. & H. 102; *Durham*, 1874, *ibid.* 136; *Montgomery*, 1892, *Day's El. Cas.* 148). But this, again, is a question of degree; the members, therefore, of a large committee, several hundreds in number, were held not to be agents, the number itself precluding the idea of confidence being reposed in each individual by the candidate (*Westminster*, 1869, 1 O'M. & H. 92); so, also, the members of a self-constituted committee of volunteers are not agents (*Drogheda*, 1857, Wolf. & D. 209; *Staleybridge*, 1869, 1 O'M. & H. 67).

Members of political associations or clubs, and more particularly members of an executive committee of such an association, if actively participating in the actual conduct of an election, may be agents for the candidate; whether they are so depends upon the facts in each case; the recognition of their action by the candidate, *e.g.* by his allowing them to canvass for him personally, and not merely for the party he represents, would make the association, or its executive committee, his agents. The agency of political associations has been a subject of considerable importance at recent elections, and has figured conspicuously in recent petitions (see *Taunton*, 1869, 1 O'M. & H. 181; *Blackburn*, 1869, *ibid.* 200; *Wakefield*, 1874, 2 O'M. & H. 102; *Bewdley*, 1880, 3 O'M. & H. 145; *Wigan*, 1881, 4 O'M. & H. 7; *Walsall*, 1892, *ibid.* 123; *Hexham*, 1892, *ibid.* 145; *Worcester*, 1892, *ibid.* 153; *Rochester*, 1892, *ibid.* 158; *Lancaster*, 1896; *Tower Hamlets*, 1896).

Members of associations of a non-political character, *e.g.* the Licensed Victuallers' Association, are obviously on a somewhat different footing from that of members of political associations, for although in the course of advancing their own interests at an election, which they are entitled to do, they may incidentally afford support to one of the candidates, they do not thereby become his agents (*Walsall*, 1892, 4 O'M. & H. 124; see also *Day's El. Cas.* 46; *Stepney*, 1892, *ibid.* 118).

The agency of the clergy, bishops and priests, has been frequently established at Irish elections, and their acts have in many cases avoided the election (*Galway*, 1872, 2 O'M. & H. 53; *Galway*, 1874, *ibid.* 197; *South Meath*, 1892, 4 O'M. & H. 130; *North Meath*, 1892, *ibid.* 185).

Agency at a previous election is not as a general rule evidence of agency at a subsequent election (*Ashburton*, 1859, Wolf. & B. 3; see also *Penryn*, 1835, Kn. & O. 443). Circumstances may, however, so connect the two elections as to make such evidence admissible; so, where an organised system of bribery had prevailed at a previous election, it was held that the agent who had carried on such system, though he had received no fresh authority, was still an agent at a subsequent election (*Waterford*, 1870, 2 O'M. & H. 2). But evidence of agency at a previous election would only be admitted under special circumstances.

In the case of a joint candidature, where two candidates coalesce, the agents of the one are the agents of the other, so that if any corrupt act is proved to have been done subsequently to the coalition, by an agent of one, both will be jointly responsible for it (*North Norfolk*, 1869, 1 O'M. & H. 240; see also *Bridgwater*, 1869, *ibid.* 113; *Stafford*, 1869, *ibid.* 232; *Norwich*, 1871, 2 O'M. & H. 39), though, in a recent case, the Court granted relief to one of two joint candidates, the other being unseated (*Southampton*, 1895). But joint attention to the registration does not necessarily imply joint-candidature (*Tamworth*, 1869, 1 O'M. & H. 82). For a statutory definition of joint candidates, see the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, sched. i. pt. v. (4)).

The brother of a sitting member (*Ipswich*, 1857, Wolf. & D. 178), the

partner of an agent (*Norwich*, 1833, Per. & K. 565), and the son of an agent (*Westminster*, 1869, 1 O'M. & H. 96), though they may have taken part in the election, are not necessarily agents; but in one case the respondent was held liable for the act of the wife of an agent (*Cashel*, 1869, 1 O'M. & H. 288).

Each case, however, depends entirely upon its own particular circumstances, and the fact of agency may frequently be established as a matter of inference from an aggregate of facts which, viewed together, cogently indicate the relation, though each in itself, when considered alone, may appear unimportant and inconclusive (*Bewdley*, 1869, 1 O'M. & H. 18). In every case, indeed, agency is a result of law, to be drawn from the facts of the case, and from the acts of individuals; and the existence of agency is determined, not by the intention of the candidate, but by the authority given by him (*Sligo*, 1869, 1 O'M. & H. 301; see also *North Meath*, 1892, Day's *El. Cas.* 145).

It has recently been decided that agency for the purpose of rendering the candidate liable for the acts of persons on his behalf, may commence before the issue of the writ, and even before the dissolution (*Walsall*, 1892, 4 O'M. & H. 125; *Montgomery*, 1892, *ibid.* 168). In the former case it was said (*per* Hawkins, J.) that the period of such liability commenced from the time when it was first known that the respondent announced his intention to present himself as a candidate at the next ensuing election (see also *Lichfield*, 1895, *per* Pollock, B.; *Elgin*, 1895; *Lancaster*, 1896). A respondent has, in fact, been held liable for illegal acts of his agent committed more than eight months before the election (*Hexham*, 1892, Day's *El. Cas.* 44, 94).

Agency ceases with the termination of the election, *i.e.* on the declaration of the poll, and any corrupt acts subsequent to the election are only material against the candidate as throwing light on what took place before the election, or where it is proved that they were done by his personal direction or with his privity (*Salford*, 1869, 1 O'M. & H. 136; *King's Lynn*, 1869, *ibid.* 208; *Southampton*, 1869, *ibid.* 223; *Waterford*, 1870, 2 O'M. & H. 3; *Longford*, 1870, *ibid.* 12; *Galway*, 1872, *ibid.* 49; *Taunton*, 1874, *ibid.* 67; *East Clare*, 1892, Day's *El. Cas.* 167).

Sec. 17 of the Parliamentary Elections Act, 1868, provides that at the trial of an election petition, unless the Court otherwise directs, any charge of corrupt practice may be gone into, and evidence in relation thereto received, before any proof has been given of agency on the part of any candidate in respect of it. On this point see *Guildford*, 1869, 1 O'M. & H. 14; and *Bristol*, 1870, 2 O'M. & H. 29. When, at the trial, *prima facie* evidence of agency has been given, the onus of disproving agency rests upon the respondent (*Worcester*, 1892, Day's *El. Cas.* 89), and even though a strong *prima facie* case of agency be established, it may, like any other fact, be rebutted by evidence.

The Corrupt and Illegal Practices Prevention Act, 1883, without interfering with the previous law as to election agency, provides for the appointment of an election agent, and, in the case of counties only, sub-agents, who alone have the power to appoint all polling agents, clerks, and messengers. The names and addresses of the election agent and all sub-agents must, under the Act, be made public, so that the fact of agency in their case is beyond dispute. It should be observed that any act or default of a sub-agent has (by s. 25 (2)) the same result as if it had been the act or default of the election agent. As to the appointment, powers, and duties of the election agent and sub-agents, see ELECTION AGENT.

With regard to municipal and other elections, the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 100 (3), enacts that the principles, practice, and rules for the time being observed in the case of parliamentary election petitions, and, in particular, the principles and rules with regard to agency and evidence, are (subject to the provisions of the Act and rules made thereunder) to be observed so far as may be in the case of a municipal election petition.

This enactment is applied to municipal elections in the City of London by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vict. c. 70, s. 35; to School Board elections by sec. 36 of the same Act; to County Council elections by the Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 75; and by the Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 48 (3) and (8), to Parish Council elections and other elections under that Act.

Agency Terms.—This expression describes the arrangement for mutual remuneration, as between a country solicitor and the solicitor in London whom he employs to act as his town agent.—For the purposes of litigation, the town agent alone is recognised as the solicitor in the action. So, where a scandalous affidavit was filed by the London agent, he was held responsible for the costs as between solicitor and client, although the country solicitor himself drew the affidavit (*Ex parte Wake*, 1833, 3 Deac. & Ch. 246; and see *The Burgesses of Ruthin v. Adams*, 1835, 7 Sim. 345). The journeys of a country solicitor to town to attend counsel, and otherwise to conduct the proceedings in an action, ought not to be allowed on taxation simply on the principle that the country solicitor would probably be better acquainted with the subject-matter than the London agent, unless the solicitor had authority from his client to make these charges (*In re Storer*, 1884, 26 Ch. D. 189, *per* Pearson, J., dissenting from Bacon, C. J., *In re Foster*, 1878, 8 Ch. D. 598).

Where a country solicitor has an office in the country, and another in London, he is not entitled to agency charges for letters written from one office to another on client's business (*In re Harle*, 1868, 17 L. T. 305). According to the usual agency terms between a country solicitor and London agent, the London agent is only entitled to payment in full of all out-of-pocket expenses, and to a share of one-half or one-third, as may be agreed to, of the profit charges; he is not, in the absence of special agreement, entitled to share in any other profits made by the country solicitor in the business, or in interest paid to the solicitor on unpaid costs. An agreement by a country solicitor with a London solicitor, that the latter should be his London agent, on the usual agency terms, but that the London agent should not call upon the country solicitor to pay any of his agency bills until he had obtained payment of his bill of costs from his client, does not entitle the London agent to share in interest paid to the country solicitor on unpaid costs (*Ward v. Lawson*, 1890, 59 L. J. Ch. 323). A., a solicitor, being one of three mortgagees, arranged with another solicitor, B., to act as his agent in the matter of the mortgage, on agency terms. B. accordingly acted, and sent in his bill, prepared as between solicitor and client, which was paid by the mortgagees. B. allowed A. £100 as his share of the profits; afterwards, on the application of second incumbrancers, the bill was taxed. It was held that the taxing-master was right in taxing it on the principle of solicitor and agent, and that the benefit of the agreement enured for the trust-estate (*In re Taylor*, 1854, 18 Beav. 165). See BILL OF COSTS; COSTS; SOLICITOR.

Agenda (of Parish Council).—See LOCAL GOVERNMENT.

Agent.—See PRINCIPAL AND AGENT.

Agent, Crimes by.—In English law agency is no defence in crime. An innocent agent is treated as a mere irresponsible means by which the principal commits the crime. The same rule applies where the agent is from youth (see AGE, PRESUMPTIONS AS TO), defect of understanding (see LUNACY), ignorance of fact, or other cause, not criminally responsible for the act which he has been set to do (*R. v. Butcher*, 1849, 28 L. J. M. C. 14); and where a wife commits an offence in the presence of her husband, in which event she is held to act under his coercion (*Arch. Cr. Pl.*, 21st ed., 26–28). A guilty agent is liable as a principal offender, and cannot plead his employment, even under the Crown, as any answer in law.

The importance of the rule has been historically greatest in cases where the offence consisted in an illegality perpetrated by order of the Crown or high official (see Beven, *Negligence*, 2nd ed., 256–294), and its existence distinguishes the English law from the continental system of *droit administratif* (Dicey, *Law of the Constitution*, 4th ed., cc. v. xii.). An agent who commits a crime in execution of his instructions, may render his employer civilly liable (*Dyer v. Munday* [1895], 1 Q. B. 784); but unless the crime was the direct or natural and contemplated result of his instructions, the employer incurs no criminal liability except under certain special statutes, such as those relating to licensed dealers in alcohol or to the sale of food or drugs (*Kearley v. Tonge*, 1891, 60 L. J. M. C. 159; *Brown v. Foot*, 1892, 61 L. J. M. C. 110; *Commissioner of Metropolitan Police v. Cartwright* [1896], 1 Q. B. 655). As to crimes by commercial agents, see FACTOR.

Agents-General are representatives of the self-governing colonies of Great Britain at the metropolis. The seven Australian colonies, the Cape, and Natal, are each so represented; and the Canadian provinces, except Newfoundland (which as yet has no agent) are represented by a high commissioner, whose functions are practically the same as those of an agent-general. The high commissioner and the agents-general form together a sort of colonial *corps diplomatique*, of which the Canadian representative, as agent of by far the largest colonial agglomeration, is the acknowledged *doyen*. As an example of the duties of an agent-general, the Canadian Act, 43 Vict. c. 11, fixing those of the high commissioner, may be taken. This Act states:

“The high commissioner shall—

“1. Act as representative and resident agent of Canada in the United Kingdom, and in that capacity execute such powers and perform such duties as are from time to time conferred upon and assigned to him by the Governor in Council;

“2. Take the charge, supervision, and control of the immigration offices and agencies in the United Kingdom under the Minister of Agriculture;

“3. Carry out such instructions as he from time to time receives from the Governor in Council respecting the commercial, financial, and general interests of Canada in the United Kingdom and elsewhere.”

The practice is, to accredit the agent-general to the Colonial Secretary,

who, in turn, presents him to the Queen. He holds intercourse, however, with the different Government departments, as the interests of his colony and the instructions of his Government may demand; his position in this respect being, so to speak, more intimate than that of British representatives at foreign Courts.

All the agents-general have their offices in Victoria Street, Westminster; and they meet each other when occasion requires. From time to time they have even been associated with the British representative in diplomatic negotiations affecting colonial interests.

[See, for Canada, in *Massey's Magazine* for November 1896, article on "The Representation of Canada in the United Kingdom," by T. G. Colmer, C.M.G., Secretary of the Canadian Government Office in London.]

Aggravated Assault is not, in substance, a different offence from common assault. But where actual bodily harm (*q.v.*) is caused by an assault, the punishment may be increased (24 & 25 Vict. c. 100, s. 47). With this may be compared the penalties for libel, according as it is published with or without knowledge of its falsity (6 & 7 Vict. c. 96, ss. 4, 5; *R. v. Munslow* [1895], 1 Q. B. 758).

In cases of assault or battery on females or on boys under fourteen years of age, brought before a Court of summary jurisdiction, the Court, if satisfied that the assault or battery is of such an aggravated nature that the penalty on summary conviction for common assault would be inadequate, may try the case summarily, and, on conviction, impose imprisonment for not more than six months, or a fine not exceeding, with costs, twenty pounds (24 & 25 Vict. c. 100, s. 43). It is immaterial whether the prosecutor is or is not the party aggrieved (see AGGRIEVED). The justices may decide, but the accused cannot elect, to have the case sent for trial on indictment (42 & 43 Vict. c. 43 s. 17). In the event of sentence, on summary conviction, to imprisonment without the option of a fine, there is an appeal to Quarter Sessions (42 & 43 Vict. c. 43 s. 19). Where the credible part of the evidence would suffice to justify a conviction for indecent assault, or for a felony, or where the assault was accompanied by an attempt to commit felony, or is a fit subject for prosecution on indictment, the justices must not deal with the case summarily, but must commit for trial (24 & 25 Vict. c. 100, v. 46) (*In re Thompson*, 1860, 30 L. J. M. C. 20; *Wilkenson v. Dutton*, 1863, 32 L. J. M. C. 152). The age of the boy assaulted is determined by the opinion of the justices (24 & 25 Vict. c. 100, s. 43). In the case of assault on a boy or on a female under sixteen years of age, the procedure of the Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. c. 41, ss. 4-6, 10-19, applies, which involves *inter alia* the right of the defendant to give evidence. Where the aggravated assault is by husband on wife, the provisions of the Summary Jurisdiction Married Women Act, 1895, 58 & 59 Vict. c. 39, apply. See JUDICIAL SEPARATION. Under the enactments consolidated by this Act, no appeal lay to the High Court for a conviction of the husband of aggravated assault (*Lewin v. Lewin* [1891], Prob. 264), and the procedure seems not to be altered by the Act of 1895. The prosecution may be instituted by any person (24 & 25 Vict. c. 100, s. 43); but where a charge of aggravated assault is brought by the person aggrieved, a certificate of conviction or dismissal is a bar to all subsequent proceedings, civil or criminal, for the same cause, if, in the case of conviction, the fine or imprisonment imposed has been paid or suffered (24 & 25 Vict. c. 100, s. 45). See ASSAULT.

Aggravation in Pleading.—1. *Indictments.*—It is a well-established rule in criminal pleading, that the jury may negative by their findings any allegation in an indictment calculated to charge the accused with an offence graver than that which the jury think the facts prove against him, provided that, after the omission of such words of aggravation, there remains enough in the indictment to charge him with a substantive offence of the same character (felony or misdemeanour) as that originally charged in the indictment. The portions negatived by the jury are, in such event, regarded as superfluous (*Boaler v. R.*, 1888, 21 Q. B. D. 284, and cases there cited).

It is not now the practice to insert in indictments averments merely calculated to influence the Court to pass a severer sentence, unless proof of the facts alleged would alter the nature or maximum of the punishment which might lawfully be awarded.

2. *Civil Pleadings.*—(a) In actions of tort in which the damages are at large, it appears to be proper to plead matters in aggravation of damages, *i.e.* circumstances attending the wrong alleged, which do not directly affect the right of action, but, if proved, would entitle the jury to award exemplary or vindictive damages (*Millington v. Loring*, 1880, 6 Q. B. D. 190; *Whitney v. Moignard*, 1890, 24 Q. B. D. 630; Odgers on *Pleading*, 2nd ed., 65–67; Mayne on *Damages*, 5th ed., 44–46), and of the intention to prove which the defendant in fairness should have notice. (b) In all actions, whether of contract or tort (*q.v.*), where special damage is the gist of the action, or is not recoverable unless specially claimed, it is necessary, *where possible*, to allege definitely the particulars of such damage (see *Ratcliffe v. Evans* [1892], 2 Q. B. 524, where the subject is exhaustively treated by the late Lord Bowen, and Mayne on *Damages*, 5th ed., 533–559).

Aggravation of Damages.—In actions of contract, where the damages are liquidated, the amount of the verdict is practically determined by process of arithmetic, as soon as the facts are ascertained. The jury do a sum, and pay no heed to the motives or conduct of either party. The plaintiff may have been ruined by the failure of the defendant to pay him the money on the day it was due; but he cannot recover more than the bare principal and interest, often indeed he can get no interest.

But the case is different when the damages are *unliquidated*. Then, whether the action be of tort or of contract, the plaintiff is allowed to travel outside the bare facts which constitute his strict cause of action, and to prove extraneous matters to enhance the damages. He may plead such matters, if he think fit, in his statement of claim (*Millington v. Loring*, 1880, 6 Q. B. D. 190). Matters of aggravation are of two kinds:—

1. The plaintiff may prove every loss which he has actually sustained, and all expense which he has reasonably incurred, in consequence of the defendant's tort or breach of contract. Thus, if a railway company has failed to carry a passenger to the destination stated on his ticket, he can claim to be repaid his hotel bill and the cost of a cab, but not of a special train (*Le Blanche v. London and North-Western Railway Co.*, 1876, 1 C. P. D. 286), and he cannot recover any compensation for the worry and annoyance of the delay, or for illness caused by exposure to the cold (*Hamlin v. Great Northern Railway Co.*, 1856, 1 H. & N. 408; *Hobbs v. London and South-Western Railway Co.*, 1875, L. R. 10 Q. B. 111). So, too, if a cattle-dealer sells a diseased cow to a farmer, he is liable for the value, not only of that cow, but also of all other cows that catch the disease from it. And this is so,

whether the farmer sues in contract for breach of warranty or in tort for a misrepresentation (*Mullett v. Mason*, 1866, L. R. 1 C. P. 559; *Smith v. Green*, 1875, 1 C. P. D. 92; and see *Lepla v. Rogers* [1893], 1 Q. B. 31; and *Pape v. Westacott* [1894], 1 Q. B. 272). But in all these cases no evidence can be given of any loss which is not either the necessary or probable consequence of the defendant's act, or one which was in fact in his contemplation at the time when he so acted. See REMOTENESS OF DAMAGE.

2. In a few cases, however, the jury is permitted to award the plaintiff damages in excess of the amount which would be adequate compensation for any loss which he has in fact sustained. These are called vindictive or retributory, or exemplary damages, because the jury desires not merely to recoup the plaintiff, but also to punish the defendant by fining him for his misconduct. Where a member of Parliament persisted in shooting on the plaintiff's land and used insolent language, a verdict for £500 was held not to be excessive, though he had done no real damage (*Merest v. Harvey*, 1814, 5 Taun. 442, 15 R. R. 548). So in cases of malicious prosecution (*Hewlett v. Crutchley*, 1813, 5 Taun. 277; *Leith v. Pope*, 1780, 2 Black (W.) 1327). Again, in actions of libel and slander, "the damages are not limited to the amount of pecuniary loss which the plaintiff is able to prove" (*Davis v. Shepstone*, 1886, 11 App. Cas., at p. 191). The fact that the defendant acted spitefully and maliciously is allowed to enhance the damages. The plaintiff will accordingly urge upon the jury the violence of the defendant's language, the nature of the imputation conveyed, and the widespread circulation unnecessarily given to the charge. He may give in evidence for this purpose all the circumstances preceding and attending the publication, and any previous transactions between himself and the defendant which have any direct bearing on the matter. The jury will also consider the rank or position in society of the parties, the fact that the attack was entirely unprovoked, that the defendant could easily have ascertained that the charge he made was false, that he continued to circulate the libel after complaint was made to him, and generally that he was culpably reckless or grossly negligent in the matter. So the defendant's subsequent conduct may aggravate the damages, *e.g.*, if he has refused to listen to any explanation, or to retract the charge which he had made (*Adams v. Coleridge*, 1884, 1 T. L. R. 84). "The jury, in assessing damages, are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in Court during the trial" (*per* Lord Esher, M. R., in *Praed v. Graham*, 1889, 24 Q. B. D., at p. 55). See DAMAGES; AGGRAVATION IN PLEADING.

Aggregation of Property.—See ESTATE DUTY.

Aggrieved.—A *locus standi* to take proceedings to rectify a grievance is conferred by many Statutes upon "any person aggrieved," and questions often arise as to who are within the meaning of the words. In each case, the purposes and operation of the particular statute in which the words are used must be considered in determining their scope, since, as the cases cited show, very different constructions have been put upon them. The chief distinction suggested by the authorities is that where the rectification of a public register, as for example the registers kept under the Patents, Designs, and Trade Marks Acts is concerned, the widest construction will be

given to the words. In the *Apollinaris Co.'s Trade Marks* case [1891], 2 Ch., and at p. 224, Fry, L. J., said: "The words 'person aggrieved' appear to us to have been introduced into the Statute to prevent the action of common informers, or of persons interfering from merely sentimental motives"; and the Court decided that, upon an application to rectify the Trade Marks Register, any one who is intimidated or harassed, or whose trade is or may be restricted (see *Powell's Trade Marks* [1893], 2 Ch. 388; [1894], App. Cas. 8), by an entry in the register is, as a person aggrieved, entitled to apply to rectify the register, under s. 90. On the other hand, where the words are used to confer a right of appeal against a judicial or administrative order, only persons directly affected by the operation of the order are usually deemed to be aggrieved, so as to be able to appeal. "The words (in the Bankruptcy Act) do not really mean a man who is disappointed of a benefit, which he might have received if some other order had been made. A person aggrieved must be a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something" (*per James, L. J.*, in *Ex parte Sidebotham*, 1880, 14 Ch. D. 458).

The prosecutor under a penal statute is not a person aggrieved by an acquittal (*R. v. J. J. of London*, 1890, 25 Q. B. D. 357).

The following are instances of the use of the words:—Patents, Designs, and Trade Marks Act, 1883, s. 90 (see *Apollinaris Co.* and *Powell's* cases, *supra*, and Kerly on *Trade Marks*, p. 221). Copyright Act, 5 & 6 Vict. c. 45, s. 14 (see *Graves' case*, 1869, L. R. 4 Q. B. 715; *Chappell v. Purday*, 1843, 12 Mee. & W. 303; and Scrutton on *Copyright*, 3rd ed., p. 144). Bankruptcy Act, 1883, ss. 104, 90 (see *Ex parte Sidebotham*, *supra*; *re Reed & Co.*, 1887, 19 Q. B. D. 174; and Williams on *Bankruptcy*, 6th ed., p. 293). Licensing Act, 1872, s. 52 (see *R. v. J. J. of Andover*, 1886, 16 Q. B. D., 711). Alehouse Act, 1828, 9 Geo. IV. c. 61, s. 27 (see *R. v. J. J. of Surrey*, 1888, 52 J. P. 423; and Paterson's *Licensing Acts*, 11th ed., pp. 115, 233). 13 & 14 Car. II. c. 12, and 3 Will. & Mary, c. 11 (as to pauper settlements) (see *R. v. J. J. of Westmoreland*, 1843, 12 L. J. M. C. 113). Public Health Act, 1875, s. 253 (see *Fletcher v. Hudson*, 1879, 5 Ex. D. 287; *Bryce v. Higgins*, 1853, 14 C. B. 1, doubted in Lumley's *Public Health*, 5th ed., p. 336, *q.v.*; *Rochfort v. Atherley*, 1876, 1 Ex. D. 511). Highway Act, 1835, s. 88 (see *R. v. Taunton St. Mary*, 1815, 3 M. & S. 465).

See, further, a full discussion of the words, and a comparison between a "party grieved" and a common informer, in *Robinson v. Currey*, 1881, 7 Q. B. D. 465; see also Stroud's *Judicial Dictionary*, *s.v.*; an article in the *Justice of the Peace* for 5th Nov. 1887; and, for American cases, Lawson's *Words and Phrases*.

Agistment.—Agistment is the contract by which a person (called the "agister") takes in horses or other cattle to depasture in his grounds (2 Black. Com. 452), the consideration being usually a weekly payment of money. The duty imposed upon him by the contract is not that of an insurer, but he is bound to take reasonable care of the animals entrusted to him, and if, owing to his negligence, as in leaving his lands improperly fenced, they should be lost or injured, he will be answerable (*Broadwater v. Blot*, 1817, Holt, N. P. 547; 17 R. R. 677; *Smith v. Cook*, 1875, 1 Q. B. D. 79). As in other like cases, his responsibility extends (and is confined) to what may be fairly regarded as the natural consequences of the particular act of negligence proved against him (*Halestrap v. Gregory* [1895], 1 Q. B. 561). He is moreover bound to restore the cattle upon demand to their owner (2 Black. Com.

452), that is to say, to permit the latter to retake them, though not to re-deliver them himself (see *Corbett v. Packington*, 1827, 6 Barn. & Cress. 268). The contract of agistment is not one relating to an interest in land within the 4th section of the Statute of Frauds (*Jones v. Flint*, 1839, 10 Ad. & E. 753). An agister has sufficient possession of the cattle intrusted to him to entitle him to bring an action of trespass in relation to them (2 Roll. Abr. 551), and such an interest as to permit the property in them to be laid in him in an indictment respecting them (*R. v. Woodward*, 1796, 2 East, P. C. 653). It is now settled that no lien can be claimed by an agister for the price of the agistment, inasmuch as he does not confer any additional value on the animals bailed to him, either by the exertion of any skill of his own or indirectly by means of any instrument in his possession; and *a fortiori* is this the case where the circumstances show that it was not intended that he should have the entire and continuing possession of the cattle, as in the case of cows of which the owner is to have control, either on or away from the agister's lands, during the time of milking (*Jackson v. Cummins*, 1839, 5 Mee. & W. 342). But the lien in question may of course be conferred on the agister by express agreement (*Richards v. Symons*, 1845, 8 Q. B. 90). The practice of farmers in acting as agisters of cattle is so notorious, that, in accordance with established rule, the reputation of ownership (as to which see BANKRUPTCY), in the event of bankruptcy, is excluded (*Re Woodward, ex parte Huggins*, 1886, 54 L. T. 683). At common law, cattle taken in to be agisted can be distrained for rent (1 Roll. Abr. 669), though it would seem that absolute exemption might well be claimed for them, under a well-known principle, where they have been delivered to an agister in the regular way of his trade (see *per* Mellor, J., in *Miles v. Furber*, 1873, L. R. 8 Q. B. 77). But, however this may be, agisted cattle now enjoy a qualified privilege from distress, which has been conferred upon them, as regards tenancies to which the enactment applies (see secs. 54, 61), by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61, s. 45). The "fair price" spoken of in this section need not, it has been held, be necessarily of money; so that cows, for example, agisted on the terms "milk for meat," *i.e.* that the agister should take their milk in exchange for their pasturage, are within the statute (*London and Yorkshire Bank v. Belton*, 1885, 15 Q. B. D. 457). But it must be a payment for the feed of cattle merely, and not for an interest in the land or in the nature of rent for use and occupation; so that an agreement to allow the owner of cattle "the exclusive right to feed the grass on the land" for a specified period does not confer upon them the privilege from the landlord's right of distress given by the Act (*Masters v. Green*, 1888, 20 Q. B. D. 807). As to tithes of agistment, see TITHES.

Agnus Dei.—(1) A hymn or anthem in the following words: "O Lamb of God, that takest away the sins of the world, have mercy upon us." The words are taken from St. John i. 19, and Psalm li. and *passim*. The hymn is used in the litany of the Prayer-Book of the Church of England, and also in the *Gloria in Excelsis*, which, in the English liturgy, is placed after the communion. The words originally formed part of the litany of the Western Church, and seem to have been first introduced into the liturgy about the year 700 A.D. In the English liturgies prior to the Reformation they were said by the priest shortly after the prayer of consecration and before the communion. The first Prayer-Book of Edward VI., published in 1549, directs that on the communion time the clerks "shall sing" these words.

Certain doctrinal objections were raised to the singing of the hymn at this part of the service. The earlier authorities on the subject are: *Elphinstone v. Purchas*, 1870, L. R. 3 Ad. & Ec. 98; *Martin v. Mackonochie* (second suit), 1874, L. R. 4 Ad. & Ec. 279; *Clifton v. Ridsdale*, 1876, 1 P. C. 328. In the first two of these cases the Court (Sir Robert Phillimore) held that the singing of the hymn at this period must be considered an additional ceremony, and therefore that it was unlawful. In *Clifton v. Ridsdale* counsel for the respondent declined to argue for its legality. A doubt arose in recent years as to whether the permitting of the singing of this hymn after the reading of the prayer of consecration, and before or during the reception of the elements, constituted an illegal addition to, or alteration of, the services of the Church of England. It was argued that, on the principle laid down by the Privy Council in *Westerton v. Liddell* (Moo. Spec. Rep. 187, London, 1857), that which was not stated to be permitted must be taken to be prohibited (see also *Martin v. Mackonochie*, 1874, L. R. 2 Ad. & Ec. 116; L. R. 2 P. C. 365), and that the present Prayer-Book directs that the reception of the elements should immediately follow the prayer of consecration. These cases have, however, been completely over-ruled by the decision of the then Archbishop of Canterbury (Dr. Benson) in *Read v. The Bishop of Lincoln* [1891], Prob. 9, confirmed on appeal by the Privy Council [1892], App. Cas. 644. In this case, after an elaborate examination of historical and other authorities, it was held that, having regard to what is known to have been the practice of the Church of England at periods subsequent to the issuing of the Prayer-Book of 1552, it could not be held to be an illegal addition to the service to permit the singing of this hymn immediately after the prayer of consecration, nor could objection be taken to such singing on any doctrinal grounds.

[*Authorities*—Phillimore's *Ecclesiastical Law*, 2nd ed., p. 776; *The Bishop of Lincoln's Case*, Roscoe, London, 1891; Wilkins, *Com.* iv. 201. *Authorities cited*—*Read v. Bishop of Lincoln*, *supra* [1891], Prob. pp. 63–74; [1892], App. Cas. 644.]

(2) The words are also applied to an object of adoration in the Roman Catholic Communion, but unknown to English ecclesiastical law.

Agreed and Declared.—Where in a deed such words occur as, "It is hereby agreed and declared between and by the parties to these presents," that someone will do an act or make a payment, and that someone is a party to the deed, it is a covenant by him with the other, not a covenant by all of them (*per* Jessel, M. R., *Daves v. Tredwell*, 1881, 18 Ch. D. 359; and see *In re D'Estampes*, 1884, 53 L. J. Ch. 1017; and *Elph. Interpretation of Deeds*).

Agreement is the expression, by two or more persons, of an intention to affect the legal relations of these persons. The consequence of agreement must affect the parties themselves, otherwise the verdict of a jury or the decision of a Court sitting in banc (*q.v.*) would constitute an agreement. Agreement is a wider term than contract; it includes acts in the law of two kinds, besides those ordinarily termed contracts; it may not create obligation, *e.g.* conveyances and gifts, wherein the agreement of the parties effects at once a transfer of rights *in rem*, and leaves no obligation subsisting between them, or it may create obligation only remotely, as

marriage and settlements of property, in trust for persons born and unborn (Anson, *Law of Contract*, 8th ed., p. 2). See CONTRACT.

Agreement for a Lease.—See LANDLORD AND TENANT; LEASE; SPECIFIC PERFORMANCE.

Agreement not to Prosecute.—See PROSECUTION.

Agricultural Children.—An attempt was first made by the Agricultural Children's Act, 1873, 36 & 37 Vict. c. 67, "to make regulations with respect to the employment of children in the execution of various kinds of agricultural work, with a view to their better education." That Act prescribed certain regulations, but it remained in force only for three years, being repealed in 1876 by the Elementary Education Act, 1876, 39 & 40 Vict. c. 79, s. 52. The same object is sought to be attained by the Elementary Education Acts. It is provided that every person who takes into his employment a child of the age of eleven years, and under the age of thirteen years resident in a school district, before that child has obtained a certificate of having reached the standard of education fixed by a by-law in force in the district for the total or partial exemption of children of the like age from the obligation to attend school, shall be deemed to take such child into his employment in contravention of the Elementary Education Act, 1876, and shall be liable to a penalty accordingly (43 & 44 Vict. c. 23, s. 4; 56 & 57 Vict. c. 51; 39 & 40 Vict. c. 79, s. 5). But a person shall not be deemed to have taken a child into his employment, if it is proved to the satisfaction of the Court having cognisance of the case, that the employment is during a period exempted by special notice of the local authority of the district (*i.e.* the school board or the school attendance committee, as the case may be) for the necessary operations of husbandry and ingathering of crops, an exemption which may be extended over not more than six weeks in a year. That is to say, the local authority may, if they think fit, issue a notice exempting from the prohibitions and restrictions of the Elementary Education Act, 1876, the employment of children above the age of eight years, for the necessary operations of husbandry and ingathering of crops for the period to be named in such notice; provided that the period or periods so named by any such local authority shall not exceed in the whole six weeks between the 1st of January and the 31st of December in any one year (39 & 40 Vict. c. 79, s. 9 (3)). A copy of this notice must be sent to the Education Department, and to the overseers of every parish within the jurisdiction of the local authority (*ibid.*). The overseers shall cause such notice to be affixed to the door of all churches and chapels in the parish, and the local authority may further advertise any such notice in such manner (if any) as they think fit (*ibid.*). This notice, if issued at all, must extend to the whole district; but it may be confined to children to be employed in particular districts or in a particular branch of industry. See also ELEMENTARY EDUCATION.

Agricultural Gangs.—By the Agricultural Gangs Act, 1867, 30 & 31 Vict. c. 130, which does not apply to Scotland or Ireland (*ibid.* s. 12), regulations are made with respect to the employment of

children, young persons, and women, by gang-masters. Under the Act a "child" means a person under the age of thirteen years; a "young person" means a person of the age of thirteen and between the age of eighteen years; a "woman" means a female of the age of eighteen years or upwards; and "gang-master," "any person, whether male or female, who hires children, young persons, or women, with a view to their being employed in agricultural labour on lands not in his own occupation; and until the contrary is proved, any children, young persons, or women employed in agricultural labour on lands not in the occupation of the person who hired them, shall be deemed to have been hired with the aforesaid view" (30 & 31 Vict. c. 130, s. 3). "Agricultural gang" means a body of children, young persons, and women, or any of them, under the control of a gang-master (*ibid.*). The following are the regulations as to the employment of children, young persons, and women:—(1) No child under the age of *eight* years shall be employed in any agricultural gang (*ibid.* s. 4 (1)). This regulation must now be read as modified by the Elementary Education Acts. For, under those Acts, no child can be taken into employment under the age of eleven (39 & 40 Vict. c. 79, s. 5; 56 & 57 Vict. c. 51, s. 1). It should be further observed, that a person who takes into employment a child under thirteen, before the child has obtained a certificate of having reached the standard of education fixed by a by-law in force in the district, is to be deemed to take the child into employment in contravention of the Elementary Education Acts, 43 & 44 Vict. c. 23, s. 4. (2) No females shall be employed in the same agricultural gang with males (30 & 31 Vict. c. 130, s. 4 (2)). (3) No female shall be employed in any gang under any male gang-master, unless a female licensed to act as gang-master is also present with that gang (*ibid.* s. 4 (3)). The penalty on any gang-master contravening any of the above regulations is a penalty not exceeding 20s. for each child, young person, or woman so employed (*ibid.*). An occupier of land on which such employment takes place renders himself liable to a like penalty, unless he proves that it took place without his knowledge (*ibid.*). No person shall act as a gang-master without a licence, under a penalty not exceeding 20s. for every day during which he so acts (*ibid.* s. 5). A licence (for six months at a time only, but renewable) (*ibid.* s. 8), is granted to a gang-master by the district council in the district, or by the town council in the county borough (*ibid.* s. 7; 56 & 57 Vict. c. 73, ss. 27, 32). There is an appeal to quarter sessions against the refusal to grant a licence (30 & 31 Vict. c. 130, s. 7). See APPEALS. The applicant must show that he is a person of good character, and a fit person to be intrusted with the management of an agricultural gang (*ibid.*). A person who is licensed to sell beer, spirits, or any other excisable liquor, is disqualified (*ibid.* s. 6). The council granting the licence shall annex to their licence a condition limiting, in such manner as they think expedient, the distances within which the children employed by such gang-masters are to be allowed to travel on foot to their work (*ibid.* s. 7). Any gang-master violating the condition so annexed to his licence shall for each offence be liable to a penalty not exceeding 10s. (*ibid.*). The fee for a licence, or for a renewal, is 1s. (*ibid.* s. 9), and is paid to the council granting the licence (*ibid.*; 56 & 57 Vict. c. 73, ss. 27 (3), 32). A conviction of a gang-master of any offence against the Agricultural Gangs Act, 1867, shall be indorsed on the licence (30 & 31 Vict. c. 130, s. 10). On conviction for a second offence, justices may, in addition to any other penalty, withhold the licence for a period not exceeding three months; and on conviction for a third offence, for one not exceeding two years (*ibid.*)

After a fourth conviction, a gang-master is disqualified from holding a licence (*ibid.*). Proceedings for offences are taken under the Summary Jurisdiction Acts (*ibid.* s. 11).

Agricultural Holdings.—See LANDLORD AND TENANT.

Agricultural Property.—See ESTATE DUTY.

Agricultural Rates.—See POOR LAW (*Rating*).

Agriculture (Board of).—See BOARD OF AGRICULTURE.

Aid by Verdict and Prayer.—1. It is a rule of the common law of England, that where there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer (see DEMURRER), yet, after verdict, if the issue joined in the case be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict, and this is termed *aider* by verdict. In this article the rule of the common law only is referred to; for statutory provisions to a similar effect, see JEOPAILS. The rule applies in criminal proceedings as well as in civil. (See *Heymann v. R.*, L. R. 2 Q. B. 102; *R. v. Goldsmith*, L. R. C. C. 74, both decided in 1873.) But it does not apply if the defect, omission, or imperfection be in regard to something not in issue between the parties (*Ladd v. Thomas*, 12 Ad. & E. 117; *Hearne v. Stowell*, *ibid.* 719, both decided in 1840); nor if the plaintiff states a defective title, or no title or cause of action at all (see *Jackson v. Pesked*, 1813, 1 M. & S. 234; 14 R. R. 417).

2. Aid prayer was the term given to a legal rule by which in real actions (abolished in 1834; see ACTIONS) a tenant might call for assistance, to help him to plead, of another person, *e.g.* a tenant for life of the remainderman, an incumbent of the patron and ordinary. The party of whom aid was prayed was joined in the action, and helped to defend the title.

Aids.—Aids were obligatory payments, made by the feudal vassal to his lord in his necessities. The occasions on which they could be demanded gradually became fixed, and Glanvill (temp. Henry II.) mentions the aid helping a lord to pay the relief due to his overlord, the aid for knighting the lord's eldest son, and the aid for marrying his eldest daughter. Magna Charta (1215) named, as the three aids which the king might take from his tenants without the common council of the realm, those for redeeming his body from captivity, for marrying his daughter, and knighting his son; such aids were to be reasonable. The rate for the two latter aids was fixed at twenty shillings for the knight's fee, or twenty librates of socage land, by Statutes Edward I. c. 36, extended so as to bind the king by 25 Edward III. stat. 5, c. 11. Aids were abolished by Statute 12 Charles II. c. 24.

Air.—The air is one of those natural agents provided for the general use of mankind and other creatures without which the life of man could not be, and upon which many of his ordinary pursuits either of business or mere enjoyment depend. In these and some other respects air may be coupled with light and water, and in each the law secures for all men certain rights. Some of these rights are common to all men, as, in the case of the air, the right to breathe the air which will come, and the right to have it free from poisonous vapours. These are natural rights, but there are special rights which may be acquired with reference to property, and they are in the nature of easements. Rights relating to the air, whether natural rights or easements, divide themselves into two classes, namely, (a) rights relating to the free passage of air, and (b) rights relating to its purity.

(a) As to the former, comparatively few cases have arisen apart from light, and the principles of law relating to air as distinguished from light seem only in modern times to have been recognised; they seem to have been merged in or confused with the principles relating to light, so that, if obstruction of light was complained of, obstruction of air was generally thrown in, and the cases themselves were commonly called light and air cases, as if they were one and the same thing. In recent times the distinction has been marked, and the legal principles as to air considered separately (see *Hall v. Lichfield Brewery Co.*, 1880, 49 L. J. Ch. 655). A right to free and uninterrupted passage of air, like light, is a natural right, whether the air is passing over an open field or whether it enters a house by a window, and no wrong is done to a neighbour by opening a window to admit air; but that natural right does not entitle an individual to prevent another person exercising his natural rights, or his right of building or otherwise using his own land in the ordinary way, though he may, by long user or otherwise, be able to gain a right even to do that, and if he does, his right is an easement. See LIGHT.

The Legislature has not thought fit to interfere with prescription in the case of the use of air; though in the Prescription Act (2 & 3 Will. IV. c. 71) special and exceptional provision was made for the easement of light (see ANCIENT LIGHTS), nothing was said about prescriptive rights to free passage of air. Whether this was omitted designedly or otherwise, or whether it was from the common habit of treating rights to light and air as identical, is uncertain, but the result is that prescription for ancient light depends now solely on the Statute, and prescription for air entirely on the common law, and the evidence for each must be different, even though the rights are claimed for the same window.

The easement or acquired right of free passage of air can only be claimed for air that would enter a window or some defined aperture in a house or building. It cannot be claimed in respect of open ground or of a windmill for the wind which would blow to them, for that would be too extensive and vague (*Webb v. Bird*, 1862-63, 10 C. B. N. S. 268, in Ex. Ch. 13 C. B. N. S. 841), neither can it be claimed for a chimney, if the erection of a building stops the current of air and makes the chimney smoke (*Bryant v. Lefever*, 1879, L. R. 4 C. P. D. 172).

The converse of the right to free passage of air to a building is a right of free passage of air from it; or, in other words, ventilation. This right has only been recently brought to notice in the case of *Bass v. Gregory*, 1890, 25 Q. B. D. 481, in which case ventilation was procured for a cellar through a hole or shaft to an unused well.

(b) Purity of air is a natural right, the infringement of which is commonly called a nuisance. See NUISANCE.

It is obvious that, if absolute purity of air were insisted on to its fullest extent, it would be impossible to carry on many of the ordinary affairs of life and necessary trades, and it is therefore subject to limitation. In the cases of *Bamford v. Turnley*, 1862, 3 B. & S. 66, and in *St. Helen's Smelting Company v. Tipping*, 1865, 11 H. L. 642, this subject was fully considered. The general principle to be extracted from these and other cases, as to the occasions on which pollution is justifiable and when not, seems to be that, in the absence of an easement, pollution of the air to such an extent and in such a manner as to produce material injury to health or property is in every case an actionable injury; and it is no justification to allege that the injury was caused by the exercise of a trade in a convenient and proper place, and that the carrying on of it there was a reasonable use by the defendant of his own land; but, if mere personal discomfort is produced, these facts may justify the injury produced, for, though everyone has a right that the air shall not be polluted to such an extent and in such a manner as to interfere materially with the ordinary comfort of human existence, yet he must not be fastidious, for the law will not give a remedy for trifling or mere temporary annoyance, and the locality in which he dwells must be taken into consideration.

In the case of private nuisance by pollution of air, a right to cause such a nuisance may be acquired by long user, but no such right can be so acquired against the public.

It is no justification for a nuisance by pollution of air merely to say that the party complaining came to the nuisance, that is, that the nuisance existed on his land before he came there; for purity of air is a natural right incident to the possession of land, and it cannot be destroyed till an adverse right has been acquired by long user or grant.

[See Goddard on *Easements*; Gale on *Easements*.]

Airway.—See MINES.

Aisle.—The word aisle is said to be derived from the French *ail* (*ala*) a wing; for the Norman churches were built in the form of a cross, with a nave and two wings. It signifies the lateral divisions of a church, or of any part of it, as the nave, choir, or transepts are called aisles.

An aisle may be private property, but to establish such right the owner must show immemorial possession, and that the owner of the house in respect of which it is claimed, has repaired it.

An aisle in a church, which has time out of mind belonged to a particular house and been maintained and repaired by the owner of that house, is part of his frank-tenement (*q.v.*), and the ordinary cannot dispose of it or intermeddle in it. "And the reason is, because the law in that case presumes that the aisle was erected by his ancestors, or those whose estate he has, and is thereupon particularly appropriated to their house. But otherwise it is, if he hath only used to sit and bury in the aisle, and not repaired it; for the constant sitting and burying in the aisle, without reparation, doth not gain any peculiar property therein; but the aisle being repaired at the common charge of the parish, the common right of the ordinary takes place, and he may appoint whom he pleaseth to sit there" (Gibbs. *Cod.* 197). The freehold of the aisle may be vested in the person entitled to the exclusive use of the same; or such person may have the exclusive use, while the freehold is in the incumbent. A person

entitled to such possession may have a prohibition against the ordinary, if he attempts to remove him (*Churton v. Freuri*, 1866, L. R. 2 Eq. 634) *Corven v. Pym*, 1613, 3 Inst. 202; *Francis v. Ley*, 1615, Cro. (2), 366.

The possession of an aisle and the right to its exclusive use is not necessarily annexed to a dwelling-house, and the possessor may convey it to another (*Chapman v. Jones*, 1869, L. R. 4 Ex. 273).

If a person having a house in a parish build a new aisle in a church, he may, it appears, have a faculty from the bishop to hold the same to the use of himself and his family to bury their dead, or to hear divine service in it; but such a faculty, it is apprehended, must in express terms, or by reasonable intentment, show an intention to annex the aisle to the house (see *Fuller v. Law*, 1825, 2 Ad. & E. 419).

It is conceived that if the faculty were to a man and his family, it would be personal to the grantor and his family, to the exclusion of the future occupiers of the house, and the privilege would be enjoyed by him, so long only as he continued in the parish (*Prideaux's Churchwarden's Guide*, 16th ed., pp. 285, 286 (note)).

The right to a seat in a pew in a private aisle may be annexed to a house outside the parish, by a faculty (*Davis v. Witts*, 1809, For. 14; 5 R. R. 708; but not, it is conceived, in a public aisle. Such right may, however, exist by prescription, on the ground that the parishes being later in date than churches, such house, though not in the parish, may formerly have been within the ecclesiastical limits of the church (*Larsley v. Hayward*, 1827, 1 Y. & J. 583; but see *In re the Cathedral Church St. Colomb., Londonderry*, 1863, 8 L. J. 861).

[*Authorities*.—*Prideaux's Churchwarden's Guide*, 6th ed.; *Steer's Parish Law*; *Rogers, Ecclesiastical Law*; *Phillimore, Ecclesiastical Law*, 2nd ed., vol. ii. 1403–1405, 1434.] See also PEWS.

Ajmere-Merwara, a district of British India, entirely surrounded by Native States. The district is under a commissioner having the powers of a civil judge, from whose Court there is an appeal to the Queen in Council. A local code (not authoritative) is published, containing the Acts, etc., which are in force within the district. The latest appeal from Ajmere is reported (L. R. 6 Ind. App. 238). See PRIVY COUNCIL, as to conditions of appeal.

Alabama Case.—The most celebrated international difficulty which has as yet been submitted to arbitration. See ARBITRATION (INTERNATIONAL). The *Alabama* was a vessel built in British waters for use as a war vessel by the Southern Confederates during the United States civil war. The United States minister called the attention of the British Government to the object for which the vessel was notoriously being built, but the law officers considered the evidence offered as to this insufficient, and she was allowed to sail from Liverpool. She was equipped for war at the Azores.

A claim for the damage inflicted by the *Alabama* on Federal trade was submitted under the Treaty of Washington (May 8, 1871) to the arbitration of an international tribunal, constituted as follows:—Lord Chief-Justice Cockburn (Great Britain), Charles Francis Adams (United States), Count Sclopis (Italy), M. Stämpfli (Switzerland), Marcos Antonio d'Aranjo, Viscount d'Itajubá (Brazil). It met at Geneva on December 17, 1871.

The award, delivered on September 15, 1872, made Great Britain liable for the damage sustained by the Northern States, and assessed the indemnity due by the former at £3,229,166.

In the treaty of submission certain rules were proposed by the American commissioners, and agreed to by Great Britain, as principles by which the deliberations of the tribunal of arbitration were to be governed, though it was declared on behalf of Great Britain that she did not assent to the rules as a statement of the principles of international law in force at the time when the claims mentioned arose. The high contracting parties agreed to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and invite them to accede to them.

The rules in question were as follows :—

“ A neutral government is bound—

“ *First.* To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

“ *Secondly.* Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

“ *Thirdly.* To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.”

These rules are considered by jurists as a statement of contemporary international law on the points they deal with.

A claim by the United States for indirect damage was negatived by the tribunal at the outset of the proceedings. See FOREIGN ENLISTMENT.

Alb.—See VESTMENTS.

Aldermen.—By the Municipal Corporations Act, 1835, 5 & 6 Will. iv. c. 76, and other Acts, consolidated by the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, the council of a borough consists of the mayor, aldermen, and councillors, elected as prescribed by ss. 50–61.

County Councils under the Local Government Act, 1888, 51 & 52 Vict. c. 41, are, as to their constitution, in all respects like the council of a borough which is divided into wards, and the aldermen are called county aldermen (s. 2).

The aldermen of the City of London are not affected by these Acts. (See as to them, Pulling, *Laws, etc., of London*, 32–36 and 74.)

The government of towns by mayor and aldermen became established by the beginning of the thirteenth century, and the title of alderman was borrowed from the Saxon “ealdorman,” the viceroy of a kingdom, county, or district, and applied to the heads of the merchant guilds into whose hands the government of the towns had fallen; it being thence transferred to the magistrates of the several wards into which towns were divided, or to the sworn assistants of the mayor, in the cases where no

such division was made (Stubbs' *Constitutional History of England*, vol. iii. pp. 561, 565).

Under s. 3 of the Act of 1882, the returning officer for the ward at the election of borough councillors is an alderman assigned by the council. The County Council may appoint any other person (s. 75 of the Act of 1888).

Aldermen are elected by the council from amongst the councillors, or persons qualified to be councillors (s. 14, Act of 1882), in the proportion of one-third of the councillors; but in the administrative county of London they are not to exceed one-sixth (s. 40 of Act of 1888). Their term of office is six years; one-half of their number retiring, who have been longest appointed, at the end of every third year. On being elected alderman, a councillor vacates his office. The qualifications of borough and county aldermen are the same; but for the county a person is eligible if he is a peer owning property in the county, or is registered as a parliamentary voter in respect of the ownership of property of any tenure situate therein (s. 11 of Act of 1882, and s. 2 of Act of 1888). Being in holy orders, or the regular ministry of a dissenting congregation, is no disqualification under the latter Act, as it is under the former.

The office is vacated by absence from the borough, except for illness, for more than six months (Act 1882, s. 39); from the county for more than twelve months (Act 1888, s. 75).

An outgoing alderman cannot vote in the election of aldermen, but he may for the mayor; not, however, for chairman of County Council (s. 75; *Hounsell v. Suttill*, 1887, 19 Q. B. D. 498; 56 L. J. Q. B. 502; 57 L. T. 102).

An alderman may be elected councillor, but he thereby vacates his aldermanship (*R. v. Bangor (Mayor)*, 1886, 18 Q. B. D. 349; 56 L. J. Q. B. 326; and in 1888, s.c. 13 App. Cas. 241; 57 L. J. Q. B. 313; 58 L. T. 502).

As to disqualifications of sex, etc., in common with other holders of municipal offices, see Roger's *Elections*, vol. iii. pp. 6-18. See LOCAL GOVERNMENT.

Alderney.—See CHANNEL ISLANDS.

Aldridge's.—The proprietor of Aldridge's is probably a horse-dealer in the technical sense of the term (*Allen v. Sharp*, 1848, 17 L. J. Ex. 209). See HORSEDEALER.

Alehouse.—Alehouses are regarded as places where excisable liquors are sold and consumed. For the purpose of the sale of intoxicating liquors, a justice's licence and an excise licence are necessary. The granting of justices' licences, the control of licensed houses, and the transfer of licences, are regulated by the Alehouse Act, 1828, 9 Geo. IV. c. 61, and amending Acts. Justices' licences are granted at the general annual licensing meeting of justices to "persons keeping or about to keep inns, alehouses, and victualling-houses, to sell excisable liquors, by retail, to be drunk or consumed on the premises" (9 Geo. IV. c. 61, s. 1). The general annual licensing meetings are held in the counties of Middlesex and Surrey within the first ten days

of the month of March, and in every other county on some day between the 20th of August and the 14th of September inclusive (*ibid.*). Excise licences are granted under the Excise Licences Act, 1825, 6 Geo. IV. c. 81, and amending Acts. The subject is fully discussed under LICENSING, *post*; see also BEERHOUSE, *post*; and LIEN (*Innkeeper's post*). For separate treatises on the Licensing Acts, reference may be made to Paterson's *Licensing Acts*, 11th ed., 1896, by W. Mackenzie; and *The Law of Licensing*, 1896, by G. J. Talbot.

Alias is a name, other than his proper baptismal name or surname, by which a person passes or is commonly known.

1. The old Statutes of *jeo fails* did not apply in criminal cases (Hawk., P. C., bk. ii. c. 23, s. 129), and so long as absolute precision was required in stating in an indictment the name and additions of the accused, a man known by more than one name, or whose name was uncertain, was described as "A. B. otherwise (*alias dictus*) C. D.," to avoid risk of a plea in abatement (see Arch. Cr. Pl., 21st ed., 45). This is now unnecessary, for in criminal as in civil proceedings, misnomer of a party can be cured by amendment, where the identity of the person intended is made clear. (See ABATEMENT.) In civil proceedings this result is effected by inserting in writ and pleadings the words A. B., *sued as C. D.*, or *trading as C. D.*;

2. Where a person is married by banns (*q.v.*) under an *alias*, the marriage is valid (1) if the *alias* is so well established as to be the name by general reputation; (2) if the true name is not known to the other party to the marriage (*Tongue v. Tongue*, 1836, 11 Moo. P. C. 90; *Gompertz v. Kensit*, 1872, L. R. 13 Eq. 369; 4 Geo. IV. c. 76, ss. 8, 22; *R. v. Kay*, 1887, 16 Cox C. C. 292).

Where the marriage is by licence (*q.v.*) and the identity of the person is established, the use of an *alias* will not affect the validity of the marriage (*Bevan v. M'Mahon*, 1861, 30 L. J. P. & M. 61; and see Eversley, *Domestic Relations*, 2nd ed., 91, 96).

3. Where a sheriff made to a writ the return *non est inventus* or *elongatus est*, or where it was desired to effect an arrest in more than one county, writs of *alias capias* or *pluries capias* were issued, usually to found or execute proceedings for attachment or outlawry. See Crown Office Rules, 1886, r. 101; and Short and Mellor, Cr. Pr. 387, 399.

Alibi.—It is a common defence to a charge of crime to allege and prove that the accused at the time when the crime was committed was at a place so far distant from the *locus delicti commissi* that he could not have been guilty. This defence is now raised under the plea of "not guilty," but at one time it was usual to raise it by "exception," a practice borrowed from Roman law (Pollock and Maitland, *Hist. of Eng. Law*, ii. 612, 651). Evidence in support of an *alibi* can be taken at the inquiry before a magistrate (see 30 & 31 Vict. c. 35, s. 3), except possibly in proceedings under the Extradition Acts (see Clarke on *Extradition*, 3rd ed., 216; 17 Clunet, *Journal de Droit International*, 49). This defence, if substantiated, is the most conclusive; but it is often fabricated, especially by habitual criminals. Where necessary, the prosecution will be allowed to call evidence in rebuttal (see Taylor on *Evidence*, 9th ed., s. 336; Best on *Evidence*, 6th ed., 326, 609).

Allen (from the Lat. *alienus*, in the sense of belonging to another place), properly speaking, one owing allegiance to a foreign State, but, in practice, applied to all persons on British soil who are not British subjects. See BRITISH SUBJECT.

The rule of the English common law is that every person born within the British dominions is a British subject, and every person born out of the British dominions is an alien. This rule is known as the *jus soli*, or territorial test of nationality, in distinction to the *jus sanguinis*, or the test of parentage. The only exception to this rule is the case of the child of an alien enemy being born in a part of the British dominions at the time of the child's birth in hostile occupation (see *Calvin's case*, Westlake, *Private International Law*, 3rd ed., p. 323; Dicey, *Conflict of Laws*, 1896, p. 176).

By 4 Geo. II. c. 21, it was enacted that the legitimate child of a natural-born British subject, though born out of the British dominions, should be deemed a British subject; and by 13 Geo. III. c. 21, this privilege was extended to the second generation on the father's side, born out of the British dominions. Thus, though the father and grandfather are both born out of Great Britain, the child is British, but the child of this child is an alien.

An illegitimate child by English law, being a *filius nullius*, does not come within the operation of these Statutes; and the illegitimate children of a British subject, domiciled in a foreign country, of which the laws permit legitimation by subsequent marriage, though they may be legitimate under the law of the domicile by his marriage with their mother, do not obtain the benefit of them in England, and continue to be aliens (see Hall, *Foreign Jurisdiction*, p. 21). See BASTARD; LEGITIMACY.

The status of aliens in Great Britain is now regulated by the Naturalisation Act, 1870, 33 & 34 Vict. c. 14. At the date of the adoption of this Act, they possessed no political rights, were debarred from ownership in British ships, and could not become owners of real property, or even lease real property for more than twenty-one years.

The Naturalisation Act, 1870, removed the last of these three disabilities, secs. 2, 3, and 4 providing that "real and personal property of every description may be taken, acquired, held, and disposed of by an alien, in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to, an alien, in the same manner in all respects, as through, from, or in succession to, a natural-born British subject."

The only exception is, that nothing in the Act is to qualify an alien to be the proprietor of a British ship (sec. 14), this subject being dealt with in the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 18, and now by that of 1894, 57 & 58 Vict. c. 60, s. 1.

An alien, "in return for the protection which he receives, and the opportunities of profit or pleasure which he enjoys, is liable," says Mr. Hall, "to a certain extent, at any rate, in moments of emergency, to contribute by his personal service to the maintenance of order in the State from which he is deriving advantage, and, under some circumstances, it may even be permissible to require him to help in protecting it against external dangers" (*Foreign Jurisdiction*, p. 171).

Thus, during the civil war in the United States, Lord Lyons was instructed "that there is no rule or principle of international law which prohibits the government of any country from requiring aliens, residents within its territories, to serve in the militia or police of the country, or to contribute to the support of such establishments" (p. 172).

The Commercial and Maritime Convention of 1882 between Great

Britain and France, provides against "military" service being required on the part of subjects of either contracting party (art. 11), and several such treaties contain a similar provision.

As to a British-born subject of full age, and under no disability, becoming an alien, see ALIENAGE.

The terms *alien friend* (alien amy) and *alien enemy* are used to designate an alien belonging to a country which is at peace or at war with Great Britain, as the case may be. When war breaks out between Great Britain and the State to which an alien belongs, he is usually allowed to remain in this country, provided his conduct is that of an alien friend. And if he resides here with the licence and permission of the Crown, he has the same rights and privileges as an alien friend (*Wells v. Williams*, 1698, 1 Salk. 46; *Casseres v. Bell*, 1799, 8 T. R. 166; Vin. Abr. "Aliens," L. pt. 8, x.).

An alien enemy's legal position seems to be as follows: Unless by virtue of an Order in Council, or duly licensed, or unless he comes into the British dominions under a flag of truce or some other act of public authority putting him in the Queen's peace, an alien enemy cannot maintain an action in the Courts of this country (*The Hoop*, 1799, 1 Rob. C. 196; *Wells v. Williams*, 1698, 1 Salk. 45); and when an alien enemy claims it, it is for him to show in virtue of what specific order, licence, or other ground he claims to be protected (*The Phoenix*, 1854, 1 Sp. Ecc. & Adm. 306, 307; *The Troija*, 1854, *ibid.* 342).

[See more fully Nelson's *Private International Law*, 1889, p. 41 *et seq.*] See also ACT OF STATE.

Alienage—Condition of being an alien, but used in the Naturalisation Act, 1870, 33 & 34 Vict. c. 14, in the sense of becoming an alien.—Sec. 4 of this Act provides for declarations of alienage by any person who, by reason of his having been born within the dominions of Her Majesty, is a natural-born British subject, but who also at the time of his birth became, under the law of any foreign State, a subject of such State, and is still such subject, and by any person who is born out of Her Majesty's dominions of a father being a British subject (*q.v.*). It also provides (sec. 3) for declarations of alienage by naturalised British subjects, formerly belonging to a State with which a convention has been entered into, to the effect that the subjects or citizens of that State who have been naturalised as British subjects, may divest themselves of their status as such. Declarations of alienage are made in the United Kingdom in the presence of any justice of the peace; and if elsewhere in Her Majesty's dominions, in the presence of any judge of any Court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law in the place in which the declarant is, to administer an oath for any judicial or other legal purpose; if out of Her Majesty's dominions, in the presence of any officer in the diplomatic or consular service of Her Majesty.

[See *Regulations* issued by the Home Office in exercise of the powers contained in the Naturalisation Act, 1870.]

Alienation in Mortmain.—Alienation in mortmain (*in mortuā manu*) is, according to Blackstone, an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal (2 Black. Com. 268). For a further discussion, see MORTMAIN; CHARITY.

Alike.—A testamentary gift to two or more alike, or to be enjoyed "alike," is synonymous with its being given equally, and creates a tenancy in common (see Stroud, *Jud. Dict.*). See SHARE AND SHARE ALIKE.

Alimony is a pecuniary allowance, payable upon a separation, by one of the parties to a subsisting marriage, to or on behalf of the other party to the marriage. It is thus distinguished from "maintenance" (*q.v.*), which is the term applicable to a permanent allowance, ordered to be paid by the guilty party to the innocent party, after a final decree dissolving the marriage. Alimony is, in the great majority of cases, payable by the husband to the wife; but it may also, if the circumstances of the case warrant it, be payable by the wife to the husband (*Swift v. Swift* [1891], Prob. 129; 63 L. T. Rep. 711; see also the remedy afforded in certain cases by the first Divorce Act, 20 & 21 Vict. c. 85, s. 45. Alimony is in the nature of a personal allowance, and is not assignable or alienable prospectively.

If the husband does not pay the permanent alimony which may have been ordered by the Court after decree of judicial separation, he is liable for necessaries supplied to his wife (20 & 21 Vict. c. 85, s. 26). And it would also seem that he would be similarly liable, at common law, for his wife's necessaries, if, after an order for separation, pronounced by a Court of summary jurisdiction on the complaint of the wife, he fail to pay the amount which may thereupon have been ordered to be paid by him for her support. (See the statutes referred to *post*.)

Alimony being, in the case of a wife, a provision intended for her actual support, arrears beyond one year are not enforced unless in exceptional circumstances, and upon good cause being shown accounting for the delay in applying to the Court.

Enforcing Orders—Rule 203 (*Additional Rules*, 1877).—A writ of *fieri facias*, or writ of sequestration, or writ of *elegit* (see EXECUTION), will be issued, as of course, in the Divorce Registry at Somerset House, upon an affidavit of service of the order and non-payment of the amount ordered. The Court will not issue an order for attachment (*q.v.*) upon non-compliance with an order for payment of alimony, as that would be contrary to the Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 4. The Court will, however, entertain an application for a garnishee order (*q.v.*) where a debt is shown to be due by a third person to the party disobeying the order for alimony.

An application for a committal order, to enforce an order for alimony, may be made, in the first instance, upon a judgment summons to the Court of Bankruptcy, or, if the party in default does not reside within the jurisdiction of the Court, the application *may* be made to the County Court of the district wherein he resides. The application must be supported by an affidavit stating that the summons has been personally served; and proof of means, in some cases by oral evidence, or in others by affidavit, must be adduced, showing that the party in default is able to discharge the debt, by instalments or otherwise. The defendant may appear, in opposition to the summons, and give oral evidence as to his means; and, whether he appear or not, the judge, on being satisfied as to the defendant's means, may make such order as may seem to him fit. If the defendant fail to obey this order, when it has been drawn up, and if he did not appear before, after it has been personally served upon him, another summons may be issued, and the defendant may be committed to prison.

By Rule 92 of the Rules and Regulations, 1865, made under the Matrimonial Causes Acts, 20 & 21 Vict. c. 85; 23 & 24 Vict. c. 144; and 38 & 39 Vict. c. 77, a wife may, at any time after alimony, whether pending suit or permanent, has been allotted to her, apply for an increase in amount; and similarly, the husband may apply for a decrease, if, since the date when the order was made, the means of the husband (or *semble* of the wife, where she has separate estate) have materially altered. The procedure upon such applications is the same as upon the original application for alimony. "*Alimony pendente lite*" applies to all matrimonial suits while pending; "*permanent alimony*" applies only after a decree of judicial separation.

Amount.—There is no hard and fast rule as to amount, but the usual practice of the Divorce Court is to allot one-fifth pending suit, and one-third after decree of judicial separation. Where the wife has separate means, the amount allotted pending suit is usually such as will make up her own income to the equivalent of one-third of the joint income of husband and wife. Similarly, where the wife has separate means, the amount allotted by way of permanent alimony is usually such as will make up her income to the equivalent of one-third of the joint income. The amount allotted, in any or either case, may be made payable at such periods, *e.g.* weekly, monthly, or quarterly, as the Court may see fit to order, having regard to the particular circumstances of the case before it. The amount ordered is payable in full, without deduction for income tax, unless the order specifically directs to the contrary.

To whom Payable.—By the Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, s. 24, and Rule 94, Divorce Court Rules, 1865, the Court may direct that any amount, allotted and ordered to be paid by way of alimony, be paid either to the wife herself, or to a trustee on her behalf, to be approved by the Court, and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee, if for any reason this shall appear to the Court to be expedient. The trustee should not be the solicitor to the party in whose favour the order is made.

The Matrimonial Causes Act, 1878, 41 Vict. c. 19, extended the powers of Courts of summary jurisdiction, in cases where a husband was convicted of an aggravated assault upon his wife within the meaning of sec. 43 (not applicable to Scotland) of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, to the granting of an order that the wife be no longer bound to cohabit with her husband, and gave such separation order the same force and effect as a decree of judicial separation on the ground of cruelty. This statute also enacted (s. 4, subs. 1) that such order might further provide that the husband should pay to his wife such weekly sum as the Court or magistrate might consider to be in accordance with his means and the means which the wife might have for her support; and the payment of any sum of money so ordered was enforceable against the husband in the same manner as the payment of money is enforced under an affiliation order. See AFFILIATION. The power to vary any such order for the payment of an allowance to the wife was restricted to the particular Court or magistrate by whom such order had been previously made, and, subject to this restriction as to the constitution of the Court before whom an application to increase or reduce the amount of the allowance was to be brought, the variation might be made from time to time, upon the application of the husband or wife, and upon proof that the means of either or both of the parties had materially altered since the

original order, or any subsequent order varying it, had been made. This Act further provided, as an addendum to sec. 4, that no order for (*inter alia*) payment of money by the husband should be made in favour of a wife who should be proved to have committed adultery (*q.v.*; and see DIVORCE), unless such adultery had been condoned; and that any such order might be discharged—only, however, by the same Court or magistrate by whom the original order had been made—upon proof that the wife had been guilty of adultery since the making of the order. All orders made under this section are subject to appeal to a Divisional Court of the Probate, Divorce, and Admiralty Division. See APPEALS. It is curious to note, as a sample of the slovenly way in which Acts of Parliament are sometimes drafted and printed, that the word "Divorce" is omitted in the proviso of the section, the Division in which appeals are to be brought being there described as "the Probate and Admiralty Division."

The Married Women (Maintenance in case of Desertion) Act, 1886, 49 & 50 Vict. c. 52, s. 1 (not extended to Scotland), gave to any married woman, deserted by her husband, power to summon him before any two justices in petty sessions, or before any stipendiary magistrate, and gave to such justices or magistrate, if satisfied that the husband, being wholly or in part able to maintain his wife, or his wife and family, had wilfully neglected or refused so to do, and that he had in fact deserted his wife, power to make an order for separation, and it further enacted, in subsec. (1), that such justices or magistrate might also order the husband to pay to his wife such weekly sum, *not exceeding* £2, as the justices or magistrate should consider to be in accordance with his means, and with any means which the wife might be possessed of and have available for the support of herself and of her family; and the payment of any sum so ordered was made enforceable against the husband in the same manner as the payment of money is enforced under an order of affiliation. It is to be noted that, whereas the amount which might be ordered under the Matrimonial Causes Act, 1878, after conviction of the husband for an aggravated assault and after a separation order made thereupon, was not limited by the Legislature, the amount which the Court or magistrate might order under the Married Women (Maintenance in case of Desertion) Act, 1886, was limited to a sum of £2. The allowance in both cases was to be a "weekly" sum, and as the power conferred was statutory, it would seem as if the Court or magistrate would have had no jurisdiction to direct the amount ordered, to be paid otherwise than "weekly." But whereas the jurisdiction to make any variation of an order, made under the Act of 1878, was strictly limited to the identical Court or magistrate who made the original order, power was given, in subsec. (1) of the Act of 1886, to the justices or magistrate by whom any such order for payment should have been made, "or other justices or magistrate sitting in their or his stead," from time to time to vary the same, on the application of either the husband or the wife, and upon proof that the means of the husband or wife had altered in amount since the original order, or since any subsequent order varying it, should have been made.

The whole of this Act, as well as sec. 4 of the Matrimonial Causes Act, 1878, are now repealed, so far as England only is concerned. See the schedule to 58 & 59 Vict. c. 39.

The Summary Jurisdiction (Married Women) Act, 1895, 58 & 59 Vict. c. 39, which does not apply either to Scotland or Ireland, greatly extends the powers heretofore exercised by Courts of summary jurisdiction to grant separation orders upon the complaints of wives

against their husbands (see s. 4). It also provides, in sec. 5, subsec. (c), that orders made under this Act by such Courts may contain (*inter alia*) a provision that the husband shall pay to the applicant personally, or, for her use, to any officer of the Court or third person on her behalf, such weekly sum, *not exceeding* £2, as the Court shall, having regard to the means both of the husband and wife, consider reasonable, provided that (s. 6) no orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery, which has not been condoned or connived at by the husband, or which he has not condoned to by his wilful neglect and misconduct. In considering the question of means, it has been held that the earnings of the husband, either actual or potential, may be taken into account (*Earnshaw v. Earnshaw*, 1896, 74 L. T. 560).

Any Court of summary jurisdiction acting within the city, borough, division, or district in which any order under this Act, or under the Matrimonial Causes Act, 1878, s. 4, or the Married Women (Maintenance in case of Desertion) Act, 1886, has been made, may, on the application of the married woman (complainant) or her husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court, at any time, alter, vary, or discharge any such order, and may, upon any such application, from time to time increase or diminish the amount of any weekly payment ordered to be made, so long as the same do not in any case exceed the weekly sum of £2; and if any married woman, upon whose application an order shall have been made under this Act, or either of the two other Acts mentioned, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall, upon proof thereof, be discharged. The procedure under this Act is to be in accordance with that prescribed under the Summary Jurisdiction Acts (see SUMMARY JURISDICTION), and the payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money under an affiliation order is enforced.

Any Court of summary jurisdiction may refuse to make an order in cases which, in the opinion of such Court, are more fit to be heard and determined in the High Court; but the High Court has power to direct the Court of summary jurisdiction to re-hear and determine the application. Appeals lie from the Courts of summary jurisdiction, upon any order or refusal to make an order, to a Divisional Court of the Probate, Divorce, and Admiralty Division of the High Court of Justice; and rules of Court may from time to time be made, regulating the practice and procedure upon such appeals. See APPEALS.

For fuller information as to the practice and procedure in regard to alimony, see Oakley, *Divorce Practice*, and Brown and Powles on *Divorce*.

Aliunde, Rule of.—See CONDITIONS OF SALE.

Alkali Works.—Alkali works and certain other works in which noxious or offensive vapours are evolved, are now regulated by the Alkali, &c., Works Regulation Act, 1881, 44 & 45 Vict. c. 47, as amended by the Alkali, &c., Works Regulation Act, 1892, 55 & 56 Vict. c. 30.

The Act of 1881, which is founded upon a report of a royal commission issued in 1878, is a consolidation with substantial amendments of the

Alkali Act, 1863 (originally temporary, but made perpetual by the Alkali Act, 1868), and the Alkali Act, 1874, repealed by this Act.

Alkali work means every work for the manufacture of alkali, sulphate of soda, or sulphate of potash, in which muriatic acid gas is evolved, and the formation of any sulphate in the treatment of copper ores by common salt or other chlorides is to be deemed a manufacture of sulphate of soda. The expression noxious or offensive gas (s. 29) does not include sulphurous acid arising from the combustion of coal (s. 29).

ALKALI WORKS.—Provision is to be made for the condensation, to the satisfaction of the chief inspector—

(a) Of the muriatic acid gas evolved to the extent of 95 per cent., and to such an extent that in each cubic foot of air, smoke, or chimney gases there is not contained more than one-fifth part of a grain of muriatic acid;

(b) Of the acid gases of sulphur and nitrogen evolved to such an extent that the total acidity of such gases in each cubic foot of air, smoke, or gases escaping into the chimney or into the atmosphere does not exceed what is equivalent to four grains of sulphuric anhydride (s. 3).

In addition to above, the owner of every alkali work is to use the best practical means for preventing the discharge of all noxious and offensive gases, or for rendering such gases harmless and inoffensive (s. 4).

Acid drainage is to be kept apart from alkali waste, or drainage therefrom, so as to prevent a nuisance. On the request of the owner, the sanitary authority of the district is to provide and maintain, at the expense of the owner, a drain for carrying off the acid into the sea or into any river into which the acid can be carried without contravention of the Rivers Pollution Prevention Act, 1876 (s. 5).

Alkali Waste is not to be deposited or discharged without the best practicable means being used for effectually preventing any nuisance arising therefrom (s. 6).

SULPHURIC ACID WORKS.—Every such work is to be carried on so as to secure the condensation, to the satisfaction of the chief inspector, of the acid gases of sulphur and nitrogen evolved in the process of manufacture to such an extent that the total acidity of such gases in each cubic foot of air, smoke, or gases escaping into the chimney, does not exceed what is equivalent to four grains of sulphuric anhydride (s. 8).

Sulphuric acid works are any works in which the manufacture of sulphuric acid is carried on (not being alkali works within the meaning of the Act, and not being works in which the manufacture of sulphuric acid is carried on in conjunction with the extraction of copper or other metals from ore) (sched. to Act).

OTHER WORKS.—The owner of any work specified in the schedule to the Act is to use the best practicable means for preventing the discharge into the atmosphere of all noxious and offensive gases evolved, or for rendering such gases harmless and inoffensive. The works scheduled are sulphuric acid, chemical manure, gas liquor, nitric acid, sulphate of ammonia, muriate of ammonia, and chlorine.

By sec. 1 of the Alkali, &c., Works Regulation Act, 1892, it was enacted that the works specified in the schedule therein should be added to those specified above, and be scheduled works for the purposes of the 1881 Act, provided that if the process used in any work specified in part i. of the schedule should be such that no sulphuretted hydrogen was evolved, the work should not be deemed to be included in the schedule. Part i. of the schedule to the 1892 Act includes alkali waste works, barium, strontium,

antimony, sulphide, and bisulphide of carbon works; part ii. Venetian red, lead deposit, arsenic, nitrate and chloride of iron works, muriatic acid works (*i.e.* works not being alkali works as defined in the 1881 Act, where muriatic acid is made), fibre separation, tar, and zinc works.

SALT AND CEMENT WORKS, *i.e.* works in which the extraction of salt from brine is carried on, and works in which bituminous deposits are treated for the purpose of making cement.

Where it appears to the Local Government Board that means can be adopted at a reasonable expense for preventing or rendering innocuous the discharge of the gases evolved in such works, the Board may from time to time, by order, require the owner to adopt the necessary means for such purpose, and may also by the order extend to such works such provisions of the Act relating to scheduled works as they see fit (s. 10).

Such an order is provisional only, and requires for its validity to be confirmed by Parliament.

By sec. 2 of the 1892 Act, works in which salt is produced by refining rock salt, other than those where the rock salt is dissolved at the place of deposit, are exempted from the provisions above mentioned.

Registration of Works.—By sec. 11, no alkali work, nor any of the above-mentioned works, are to be carried on unless they are certified to be registered. Accordingly, the works must be registered in a register containing the prescribed particulars, and the owner must, in January or February in every year, apply for a certificate of registration, the certificate issued remaining in force for one year from the 1st of April following the application.

In the case of works erected after the commencement of the Act, the owner must apply for a certificate of registration before commencing any manufacture or process therein, the certificate being issued as soon as may be, and remaining in force until the 1st April next.

Notice of Change in Ownership.—Written notice of any such change, or of any change in the other particulars stated in the register, is to be sent by the owner to an inspector within one month after the change, and the register and the certificate are to be altered accordingly, without charge and without the issue of a new certificate. If such notice is not sent, the work is not to be deemed to be certified to be registered.

Stamp Duty.—The Act imposes in respect of every such certificate in the case of an alkali work the duty of £5, and in the case of other works the duty of £3 (s. 11 (4)). These duties are stamp duties under the management of the Commissioners of Inland Revenue (*q.v.*), and all the Acts relating to stamp duties are made applicable (s. 13).

Inspection.—Secs. 14–19 deal with the appointment of inspectors for the execution of the Act, their duties, powers, and remuneration. Certain persons are declared ineligible for the post of inspector, *e.g.* anyone who practises as a land agent, or who is engaged in any work to which the Act applies. Owners are required to furnish all reasonable facilities for inspection, and, on the application of sanitary authorities, an additional inspector may be appointed.

The chief inspector is required to make an annual report to the Local Government Board of the proceedings of himself and the other inspectors under the Act.

Special Rules.—The owner of an alkali or of a scheduled work may, with the sanction of the central authority, make, and when made, alter, add to, and repeal special rules for the guidance of his workmen employed, *e.g.* in any process causing the evolution of noxious or offensive gases, and

may annex fines, which are recoverable summarily, to the violation of such rules. No fine to exceed £2.

A printed copy of such rules must be given to every person affected thereby (s. 20).

Recovery of Fines for Offences (other than offences against a special rule, *v. sup.*), (s. 20).—Various fines, ranging from £5 to £100, are imposed for contravention of the provisions of the Act, and are recoverable by action in the County Court; but, within the City of London, the Sheriff's Court is to be deemed the County Court for the purposes of the Act. The action is to be brought, with the sanction of the central authority, by the chief inspector, or by such other inspectors as the Local Government Board may direct, within three months after the commission of the offence. For the purpose of the Act, the fine is deemed a debt due to the inspectors (s. 22).

Sec. 22 contains further provisions as to appeals, and the Courts for recovery of fines in Scotland and Ireland. It is sufficient in any proceeding under the Act in relation to a fine for an offence, other than an offence against a special rule (s. 20), to allege that any work is a work to which the Act applies, and to state the name of the registered or ostensible owner, or the title of the firm by which the employer of persons in the work is usually known (s. 23).

Discharge of Owner on Conviction of actual Offender.—The owner is to be deemed the offender and liable for the fine unless he can prove that, notwithstanding due diligence on his part, the offence was committed by a named agent, and without his knowledge, consent, or connivance; provided that the inspector may proceed in the first instance against the actual offender without first proceeding against the owner (s. 25).

Complaint by Sanitary Authority.—When a nuisance is occasioned by a contravention of the Act, the sanitary authority may lay a complaint before the central authority (s. 27); the section contains a definition of the expression "sanitary authority."

Action in case of contributory Nuisance.—Sec. 28 confers a right of action upon any person injured by a nuisance, against any one or more of several persons who may have contributed to it, although the act or default of one of the offenders alone would not separately have caused a nuisance.

Central Authority means as regards England the Local Government Board, as regards Ireland the Local Government Board for Ireland, and as regards Scotland one of H. M. principal Secretaries of State.

Sanitary Authority means any local authority intrusted with the execution of the Public Health Act.

Saving as to General Law.—Sec. 31 preserves all remedies at law apart from those provided by the Act.

All.—For the various legal effects of the use of "all," see Jarman on *Wills*, and Stroud, *Jud. Dict.* "All" is equivalent to each and every (*Burnett v. G. N. of Scotland Railway*, 1885, 54 L. J. Q. B. 539), but by a context it may mean "any."

Allegation.—The technical term in ecclesiastical suits for the defendant's answer to the libel (*q.v.*) or charge.

Allegiance or Ligeance (from the old French *lige, ligeance*) is the lawful obedience which a subject is bound to render to his sovereign.

Allegiance is of three kinds: natural, acquired, or local. *Natural* allegiance is that which every subject born from his birth owes to his sovereign. He is said to be a natural liegeman, as the sovereign is said to be his natural liege lord. It is *acquired* where one is naturalised (see NATURALISATION), or made a DENIZEN (*q.v.*); and that owing by every resident in the British dominions for the protection he enjoys is called *local* (Blackstone).

It is customary, however, at the present day to restrict the use of the word to the first and second of these: the bond which attaches a subject to his sovereign, though some authors still speak of local allegiance as due by both British subjects and aliens alike while within the dominions of the Crown, to distinguish it from the allegiance due by British subjects on foreign soil, and entitling them also to protection there.

Under British law, until the Naturalisation Act of 1870, 33 & 34 Vict. c. 14, no natural-born British subject could divest himself of his allegiance; but since that Act he may make a declaration of ALIENAGE (*q.v.*), and thereafter ceases to be a British subject.

Aliens, on naturalisation, are required to take an oath of allegiance. (Naturalisation Act, 1870, 33 & 34 Vict. c. 14, s. 9; Naturalisation Oaths Act, 1870, 33 & 34 Vict. c. 102; and Regulations issued by the Home Office in exercise of the powers contained in the Naturalisation Acts, 1870.) See OATH OF ALLEGIANCE.

Alliance (from Lat. *alligo*, to tie or unite together), a state of connection with another by a league; a union between two or more States for a common object.

All States, as independent communities, have the right to contract alliances.

A protected or federal State, if it has retained its sovereignty, is also competent to contract with other States. "The proper and strict test to apply," says Phillimore, "will be the capacity of the protected State to negotiate, to make peace or war with other States, irrespectively of the will of its protector. If it retain that capacity, whatever may be the influence of the protector, the protected State must be considered as an independent member of the European commonwealth" (*International Law*, i. 91).

Alliances are generally classed as offensive or defensive, or both.

An alliance is different from a CONFEDERATION (*q.v.*), which generally takes the form of a single State in its relations with other States.

Allocatur.—The certificate of a taxing-master in the Chancery, Queen's Bench, and Bankruptcy Divisions of the High Court, and in the Houses of Lords and Commons in relation to the judicial business or private Bill legislation, and of the registrars in the Probate, Divorce, and Admiralty Divisions, in the District Registries, and in the County Courts. It allows or certifies the bill of costs, brought in for taxation, to have been taxed, and that, after deduction of the items which have been disallowed, a certain amount is due thereon. Certificate is the general name; allocatur is employed on taxation as between solicitor and client. The taxation is not completed until the allocatur or certificate is made and signed; so that

until then taxation will not be reviewed (*Sellman v. Boorn*, 1842, 8 Mee. & W. 552). It is final and conclusive as to amount, unless set aside or altered by order, decree, or rule of Court. As to disallowance of costs for misconduct after allocatur, see *Ex parte Harper*, 1882, 20 Ch. D. 685.

The allocatur is not a rule or order, within sec. 18 of 1 & 2 Vict. c. 110, whereby money is payable, so as to become a judgment (*Shaw v. Neale*, 1858, 6 H. L. 581). And a bankruptcy notice cannot, therefore, be issued for taxed costs on the taxing-master's certificate alone (*Ex parte Crump*, 1891, 64 L. T. 799).

By Order 65, r. 39, of R. S. C., 1883, objections may be taken by any party as to the allowance or disallowance of items by the taxing-master before the certificate or allocatur is signed; and the taxing-master may review his taxation. Within fourteen days from the date of the certificate or allocatur (r. 41), or within such further time as may be allowed, the dissatisfied party may apply to a judge at chambers to review the taxing-master's certificate or allocatur. It is final and conclusive as to all matters which have not been objected to.

See COSTS; TAXING-MASTERS.

Allodial or Alodial Lands.—Allodial lands are lands held absolutely by the possessor of them and not of any lord. A distinction undoubtedly existed at one period on the Continent between alodial lands and lands which were *beneficia* or fiefs, that is lands holden of a lord. Thus the owner of alodial land was subject only to a fine for neglecting the *heerbann* (levy), while the owner of a *beneficium* was liable to the penalty of forfeiture. It has been surmised that in England in pre-Norman days lands known as book-land were allodial lands, while the occupier of folk-land stood in the position of the owner of a *beneficium*. The question is, however, no longer of practical importance, as, though allodial land may still possibly exist in Scotland, the common law has, since the twelfth century, recognised that the king is the "sovereign lord or lord paramount, either mediate or immediate, of all and every parcell of land within the realme" (Co. Lit. 65a). No claim on the part of a person in possession of any lands as against the Crown, claiming by escheat, would be recognised on the plea that the land was allodial or not held of any lord. (Stubbs' *Constitutional History of England*, vol. i. chap. vii.; Challis's *Law of Real Property*, 2nd ed., p. 5.)

Allonge.—A slip of paper annexed to a bill of exchange for the inscription of such indorsements as there is not room for on the bill. An allonge becomes part of the bill and requires no additional stamp. Allonges are more frequently met with in countries where the Code Napoleon is in force than elsewhere, inasmuch as the Code requires an indorsement to express the consideration, holding it to be otherwise a mere procuration (Bills of Exchange Act, 1882, s. 32 (1); Byles on *Bills*, 15th ed., p. 170).

Allotments.—The word allotment signifies a parcel of land appropriated for any specific purpose. In connection with the enclosure of commons, the Inclosure Act, 1845, authorises allotments—

1. For public exercise and recreation (s. 30);
2. For the labouring poor (s. 31);

3. For repair of roads (s. 72);
4. For other public purposes (*ibid.* s. 34);
5. After the several allotments before-mentioned, to the lord of the manor in lieu of his interest in the soil (s. 76); and lastly, after satisfaction of all the above purposes,
6. To the several persons interested, in proportion to their respective rights and interests (s. 77).

The word allotment is chiefly used in recent legislation, *e.g.* in the Allotment Acts of 1887, 50 & 51 Vict. c. 48, and 1890, 53 & 54 Vict. c. 65, and the Local Government Act, 1894, 56 & 57 Vict. c. 73, in the second sense, namely, an allotment for the labouring poor. The earlier legislation on the subject may be summarised as follows:

(1) The Act 59 Geo. III. c. 12, after referring to the Poor Law Act of Elizabeth, 43 Eliz. c. 2, whereby the churchwardens and overseers were to set certain poor to work, empowers the churchwardens and overseers, with the consent of the inhabitants in vestry assembled, to take into their possession lands belonging to the parish or the poor, or to purchase or hire suitable lands not exceeding twenty acres, increased by 1 & 2 Will. IV. c. 42, to fifty acres, for the employment of the poor; and to let portions of such land to poor and industrious inhabitants, on reasonable terms and conditions to be determined by the vestry.

(2) 1 & 2 Will. IV. c. 42, gives power to churchwardens and overseers to enclose waste lands to the extent of fifty acres, subject to the consent of the lord of the manor and the major part in value of the persons having right of common, and to cultivate and improve for the benefit of the parish and the poor, and to let the same as in the last-mentioned Act provided.

(3) 1 & 2 Will. IV. c. 59, extends the powers conferred by the last Act over forest or waste lands belonging to the Crown, in or near to the parish, subject to the consent of the Treasury.

(4) 2 Will. IV. c. 42, after reciting that in parishes enclosed under (private) Acts of Parliament, there are in many cases allotments made for the benefit of the poor, chiefly with a view to fuel, requires the trustees of any such allotment, together with the churchwardens and overseers of the poor, in parish vestry assembled, to let portions not exceeding one acre as a yearly occupation to industrious cottagers of good character, being day-labourers or journeymen legally settled in the parish.

Provision is made by the Poor Allotments Management Act, 36 Vict. c. 19, s. 3, for the appointment of committees by allotment trustees and by the vestry, where the number of either body exceeds twenty, to constitute an allotment authority.

2 Will. IV. c. 42, also provides (s. 3) for the holding of a vestry meeting every year, for the purpose of receiving applications for tenancies. The same Act also dealt with the payment and application of the rent for the purpose of fuel, and, subject to certain exceptions, extended its proviso to allotments acquired under the earlier Acts; but the rents of lands acquired under these Acts must be applied to the relief of the poor-rate (36 Vict. c. 19, s. 14).

(5) By 5 & 6 Will. IV. c. 69, it was enacted that all powers and authorities given by the four previous Acts should in future be exercised (subject to the control of the Poor Law Commissioners, now the Local Government Board) by the guardians of the poor.

It was decided that the legal estate in parish property was not transferred by this Statute from churchwardens and overseers to the guardians

(*Doe & Norton v. Webster*, 1841, 12 Ad. & E. 442, 9 L. J. Q. B. 373; *Worge v. Relf*, 1842, 11 L. J. M. C. 125).

As a matter of fact, the guardians never used the powers in respect of allotments conferred on them by this Act; but these powers continue to subsist.

In construing these Acts, it should be borne in mind that the vestry in a rural parish is now for the purpose of these Acts superseded by the parish council (*q.v.*); that the duties, powers, and liabilities of the churchwardens and overseers, in regard to the holding or management of parish property (other than ecclesiastical), and the holding or management of village greens or allotments, are transferred to the parish council by the Local Government Act, 1894, s. 6 (1), c. 3; and that in a rural parish, which has not a parish council, the legal interest in all property which would be vested in the parish council, if there were one, vests in the chairman of the parish meeting and overseers, subject to all trusts and liabilities (*ibid.* s. 19 (7)); that the duty of appointing allotment wardens (see *post*), or any committee or managers for the purpose of allotments, is transferred to the parish council (*ibid.* s. 6 (4)), whilst *trustees*, who hold any property for the purpose of allotments, whether under the Inclosure Acts or otherwise, for the benefit of the inhabitants of a rural parish, *may*, with the approval of the Charity Commissioners (see CHARITY COMMISSION), transfer such property to the parish council or their nominees (*ibid.* s. 14 (1)). Lastly, the guardians in rural districts are superseded by the district council (*q.v.*) (*ibid.* 5, 24).

Under the provisions as to allotments in the Inclosure Act, 1845, 8 & 9 Vict. c. 118, and amending Acts—

(a) The Inclosure Commissioners, now the Board of Agriculture (*q.v.*), may require the appropriation of an allotment for the labouring poor as a condition of the inclosure, and if the Board abstain from doing so in any case, they must state the grounds of such abstention in their annual report (8 & 9 Vict. c. 118, s. 31). And the meeting of persons interested in the land to be enclosed, convened by the Board, may instruct the valuers appointed to divide the land, subject to the approval of the Board, to appropriate part for allotments or field gardens for the labouring poor (*ibid.* s. 34).

(b) Such allotments are under the Acts to be vested in the churchwardens and overseers (*ibid.* s. 73), and managed by allotment wardens, namely, the incumbent of the parish or ecclesiastical district, and one churchwarden and two other ratepayers of the parish (s. 108), who are to let to poor inhabitants of the parish, in gardens not exceeding one acre in extent, on yearly tenancies, subject to certain regulations laid down in the Act (8 & 9 Vict. c. 118, ss. 109, 110, 111).

(c) Surplus rents are to be applied in improving the field gardens, or hiring or purchasing additional field gardens (39 & 40 Vict. c. 56, s. 27).

The Allotments Extension Act, 1882, 45 & 46 Vict. c. 80, requires trustees of lands held for the benefit of the poor to set aside a suitable portion for allotments (s. 4), upon terms (s. 13), similar to those contained in the Inclosure Acts. They may also make rules, which must be submitted to the Charity Commissioners, who may disallow any rules by order (s. 9).

If the trustees neglect to set apart land under this Act, the Charity Commissioners, upon the application of any four cottagers or labourers, who would be entitled to an allotment, may issue an order (s. 10) against them for the remedy of such neglect, enforceable as an order under the Charitable Trusts Acts. But the trustees may be excused by a certificate granted by the Charity Commissioners, that the land is so unsuitable for allotment, that no part thereof can be usefully set apart for the purposes of the Act

(s. 11). In practice, such certificate is only granted upon the report of a surveyor. Sec. 43 (b) exonerates the trustees from setting aside a portion of the charity land to the injury of the remainder.

The Allotments Compensation Act, 1887, 50 & 51 Vict. c. 26, defines the term "allotment" for the purposes of the Act, to mean any parcel of land, of not more than two acres in extent, held by a tenant under a landlord, and cultivated as a garden or as a farm, or partly as a garden and partly as a farm. This Act applies to allotments the principle of tenants' compensation for improvements established by the Agricultural Holdings Act, 1883 (see LANDLORD AND TENANT). See also Tenants' Compensation Act, 1890, as to tenants and mortgagees.

Recent legislation as to allotments for the labouring poor is chiefly contained in the Allotments Act, 1887, 50 & 51 Vict. c. 48, as modified by the Allotments Act, 1890, 53 & 54 Vict. c. 65, and by the Local Government Act, 1894, 56 & 57 Vict. c. 73.

The effect of these Statutes taken together is as follows:—

It is the duty of any urban or rural sanitary authority, on a representation made to them in writing under the Allotments Act, 1887 by any six parliamentary electors or ratepayers, resident in the case of an urban district in that district, or in the case of a rural district in some parish thereof, or in a rural district by the parish council, to take such representation into consideration; and if they are of opinion, after inquiry made in consequence of such representation, or of their own initiative, that there is a demand for allotments for the labouring population in the district, and that such allotments cannot be obtained at a reasonable rent, and on reasonable conditions, by voluntary arrangement between landowners and applicants for such land, they may acquire land suitable for such purpose by purchase or hire, within or without their district or parish, and let it in allotments to the labouring population resident in the district or parish (s. 2 (1)), but such land is not to be acquired except on such terms as will make it reasonable, in the opinion of the authorities, to expect that all expenses, except expenses incurred in making roads for the use of the public, may be recouped out of the rents obtained.

A question may arise as to whether specific performance can be enforced against an authority which has given notice to treat under this section, and afterwards refuses to complete, on the ground of inability. The answer seems to depend on the Court, whether the authority would be held as a private promoter or a trustee for the public (see *Morgan v. Metropolitan Ry. Co.*, 1868, L. R. 3 C. P. 553; L. R. 4 C. P. 97; *R. v. Hungerford Market Co.*, 1833, 4 Barn. & Adol. 326; and with *R. v. Commissioners of Woods and Forests*, 1851, 15 Q. B. 774; Brooke Little's *Allotment Acts*, 192).

For the purpose of the purchase of land by agreement, s. 178 of the Public Health Act, 1875, 38 & 39 Vict. c. 55, and the Land Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, are incorporated in this Act.

In the event of the sanitary authority being unable to acquire suitable land, by agreement on reasonable terms, it may petition the county authority, now the county council (*q.v.*), on the subject. The county council, acting by its standing committee (Allotments Act, 1890, s. 3), will, after certain preliminary proceedings, regulated by sec. 9 of the Local Government Act, 1894, hold a public inquiry, at which all persons interested shall be permitted to attend. The costs of such inquiry are regulated by sec. 274 of the Public Health Act.

After the inquiry the council may make an order putting into effect the

compulsory clauses of the Lands Clauses Consolidation Acts. If the county council refuse to make such order, the parish or district councils, but no other persons, may appeal to the Local Government Board, who may, after local inquiry, make the order; but any order on the part of the Local Government Board overruling a county council, shall be laid before Parliament. A copy of this order, when made, must be served in the prescribed manner on such persons as the local board may direct, with a statement that the order will become final and have the effect of an Act of Parliament, unless a memorial for further inquiry is presented to the Local Government Board by some person interested. If no memorial is presented, or, being presented, is withdrawn, the Local Government Board shall without inquiry confirm such order. Otherwise the Board shall hold an inquiry, and confirm, amend, or disallow the order, and any order so made shall have the effect of an Act of Parliament (Local Government Act, 1894, s. 9 (5)-(7)).

The rent is recoverable by the district council as landlords in like manner as in any other case of landlord and tenant (Allotments Act, 1887, s. 8 (1)). See LANDLORD AND TENANT.

The district council may make and vary regulations for the management of allotments, subject to the approval of the Local Government Board (s. 6 (1)). But the Act provides that the rent shall be fixed at an amount not less than such as may reasonably be expected to insure the district council against loss (s. 7 (1); s. 7 (2)); that no one person shall hold any allotment exceeding one acre, and an allotment shall not be sublet (s. 7 (13)); that if an allotment cannot be let in accordance with the provisions of the Act, it may be let to any person at the best annual rent obtainable, but so that possession may be resumed within twelve months (s. 7 (4)).

The district council may appoint and remove allotment managers, consisting of their own members, with or without other persons, or wholly of other persons. In a rural parish, provision is made for the election of allotment managers, but by virtue of the Local Government Act, 1894 (s. 6, subs. 4), the parish council are now the allotment managers, and the electoral provisions will accordingly only apply in rural parishes where there is no parish council.

The Act further gives power (s. 12) to the district council to submit a scheme to the county council for the provision of common pasture, and the county council may thereupon make an order authorising the district council to carry such scheme into effect.

The district council may borrow for the purposes of acquiring, improving, and adapting land under the Act (s. 10, subss. 4 and 5).

There is a right of appeal to the county council (Allotments Act, 1890) in cases where the district council (but not a borough council) fail to acquire land, upon representation made to them; and if, after inquiry, the county council are satisfied that the land ought to be acquired, the powers of the district council under the principal Act are transferred to the county council. But by sec. 9, subs. 14, of the Local Government Act, 1894, where there is a parish council, the land must be assured to the parish council, in whom thereupon all powers of management become vested.

By the Allotments Rating Exemption Act, 1891, it is provided that allotments shall be rated at one-fourth of the net annual value of the land, as under the Public Health Act, 1875, s. 230.

The parish council have also, under the Local Government Act,

1894, the power to hire land for allotments (s. 10, c. 1). If they are unable to obtain them by hire, on reasonable terms, they may represent the case to the county council, and the county council may make an order authorising the parish council to hire compulsorily for allotments for a period not less than fourteen, and not more than thirty-five, years, such land in or near the parish as is specified in the order, such order being subject, as to confirmation by the Local Government Board and otherwise, to the same regulations as an order made by the county council for the compulsory purchase of land for allotments.

Hired land may be let in allotments exceeding one acre to one person, but if hired compulsorily, not exceeding four acres of pasture, or one acre of arable and three acres of pasture. Also a stable, cowhouse, or barn, may be erected on a hired allotment, but not on any allotment purchased under these Acts (Local Government Act, 1894, s. 10 (6)).

Allowances.—See JUST ALLOWANCES.

Allowances (in regard to Estate Duty).—See ESTATE DUTY.

Alluvion.—In Roman law this term denotes the gradual and imperceptible increase which land bordering on a river or on the sea sometimes undergoes through the silting up of ooze, soil, sand, or other matter, or the permanent retiral of the water. Such latent increase was deemed to fall to the proprietor of the land to which it became attached. The principle has been incorporated into English law, and land so formed in England is held to accresce, even as against the Crown as lord of the foreshore (*q.v.*), to the owner of the adjacent soil. See ACCESSION; ACCRETION.

The leading case is *R. v. Lord Yarborough*, 1828, 5 Bing. 163, where the word "imperceptible" was defined to mean not perceptible in its progress, though it might be capable of measurement after the lapse of a considerable time. If the formation is so rapid as to be instantly perceptible, as when the sea shrinks suddenly beyond the usual water-mark, we have DERELICTION (*q.v.*) and not alluvion, and in such a case there is no accretion unless the right to the increase has been granted by the king, as lord of the sea around the coast and of all land not in occupancy to subjects, or unless there is some properly established local or general custom regulating the disposal of such increase. So in *A.-G. v. Reeve*, 1884, 1 T. L. R. 675, where the deposit was visible from day to day, the Crown obtained judgment. See *Foster v. Wright*, 1878, L. R. 4 C. P. D. 438, and *Hindson v. Ashby*, 1895 [1896], 1 Ch. 78.

The Roman authorities base the principle on the *jus gentium*, and in this are followed by Bracton, lib. ii. c. 2. Others give as the reason for it that since an owner of land adjoining the sea has to bear losses arising therefrom, so he ought to be entitled to any gain similarly accruing, and that the king's prerogative does not extend to alluvion, because *de minimis non curat lex*.

In the case of artificial waters the principle may also apply, but each such case will be decided upon its own merits.

Alluvion (In International Law).—Used to denote the gradual deposit of matter, forming new land, by a river serving as a boundary between two States. Whether the channel remains common to the inhabitants of either bank, or whether each State possesses half of it, their respective rights are not in anywise changed by alluvion; and if the possession of the river be equally divided between the owners of the opposite banks, the mid-channel (see *THALWEG*), however the river may encroach on the one side and recede on the other, will continue to form the boundary.

[See *Twiss, Law of Nations in Time of Peace*, p. 251.]

Almanack.—A printed almanack was used to decide a disputed date at least as early as 11 Henry VII. (*Yearbook, f.s.*) (*Tulton v. Dawke*, 1860, 5 H. & N. 647). But the only almanack which the Courts will recognise is that annexed to the Book of Common Prayer; and this is not evidence of the time of sunrise or sunset on any particular day, or of the day of the week; only of the day of the month, of the number of days in the week, of the order of the months, and of such divisions of time as public fasts or feasts, and the commencement or ending of legal sittings. See *MONTH*.

Almoner.—An officer of the royal household whose function it is to distribute the royal alms. The Lord Almoner is now usually a bishop.

Alms.—Alms may be described as eleemosynary contributions for the poor. The ecclesiastical law enjoins the collection of alms for the poor by the deacons, churchwardens, or other fit persons during the reading of the offertory, which alms are to be brought to the priest after divine service, to be employed in such pious and charitable uses as the minister and churchwardens shall think fit, and, in case of their disagreement, by the ordinary.

By Canon 87 of 1603, the churchwardens are ordered to provide a strong chest with three keys (to be respectively kept by the incumbent and two churchwardens), and set it into the most convenient place, to the intent that the parishioners may put into it their alms for their poorer neighbours. The alms are to be taken out by the keepers of the keys quarterly, or as often as need be, and distributed, in the presence of most of the parish, or six of the chief of them, to their most poor and needy neighbours.

At common law, persons who had been obliged to depend in whole or part on eleemosynary assistance, have been held to be disqualified from exercising the franchise at common law, but this did not apply to a county voter continuing in possession of his freehold. In boroughs, the receipt of alms within a limited period was held to be a personal disqualification. Now, by 2 & 3 Will. IV. c. 45, s. 36, the receipt of parochial relief or other alms is a disqualification for the parliamentary franchise, and by the Municipal Corporations Act, 1882, s. 9, the receipt of union or parochial relief or other alms is a disqualification for the municipal franchise.

As to the meaning of "other alms" such as by the law of Parliament now disqualify, the following general rules may be stated:—

In many of the old boroughs the point has been determined by the usage of the place and the decisions of the House of Commons (*Rogers on Elections*, 15th ed., pp. 190, 195).

In old boroughs where the usage was undetermined, and also in new boroughs where the usage was undetermined, it seems to have been held that those funds only disqualified which formed part of the general parish resources for the relief of the poor; but in *Harrison v. Carter*, 1876, 2 C. P. D. 26, it was held that alms, which by the law of Parliament disqualify, may include moneys distributed annually from the income of a private charitable bequest, and that the question what is such a receipt of alms as will constitute such a state of absolute indigence as to disqualify, must depend on the circumstances of the particular case.

As to the right of a parish clerk to receive alms, see PARISH CLERK. See as to parliamentary disqualification, PARLIAMENT; VOTE; ELECTION; DISQUALIFICATION.

[*Authorities*.—Steer, *Parish Law*, 4th ed.; Rogers on *Elections*, part i.; Phillimore, *Ecclesiastical Law*, vol. i. pp. 725, 726.]

Alms-house.—An alms-house is a charitable foundation for the poor generally, or for an indicated class of poor people. The Statute 18 Eliz. c. 3, 1576, empowered persons "during the next twenty years to give land to erect hospitals and other abiding and working houses for the poor without licence of mortmain." The Act 39 Eliz. c. 5, dispensed with the special licence from the Crown in such cases. To these Statutes the numerous charitable foundations of the kind which have since (particularly in the 16th and 17th centuries) sprung up in England and Wales, owe their origin. The relief of aged, impotent, and poor people is one of the charitable uses specified in 43 Eliz. c. 4. For this reason the law treats an alms-house, or a fund to be laid out in the foundation of alms-houses, as a charity (*In re White's Trusts*, 1886, 33 Ch. D. 449, 454).

The law as to alms-houses, therefore, is part of the general law as to charities (*q.v.*). The following points may, however, be mentioned:—In *Chamberlayne v. Brockett*, 1872, L. R. 8 Ch. 206, the House of Lords held that a trust in a will for the erection of alms-houses when land should be purchased for the same as thereafter mentioned, was a good charitable bequest, and an inquiry was directed as to whether any land had been rendered legally available for such purpose. In *Limbrey v. Gurr*, 1819, 6 Madd. 151; 22 R. R. 262, a trust to hold alms-houses was held to fail when the amount required was not ascertainable. The nomination of the objects of such a charity belongs to the founder and his heirs, or those whom he shall appoint, in the absence of direction, express or implied, to the contrary (*A.-G. v. Rigby*, 1732, 3 P. Wms. 145). When an alms-house is endowed out of a rent-charge arising out of manors and lands, the right of nomination belongs to the heir of the grantor, and does not pass with the manor; but where the persons wrongly entitled had enjoyed the nomination for sixty years, the Court refused to disallow payments made by them to the poor (*A.-G. v. Rigby, supra*).

The founder of a charity for alms-houses, and his heirs, may forfeit the right of nomination by a "corrupt or improper nomination of such as are not fit objects of the charity, or by making no nomination at all; but this neglect of nomination must be after such time as the founder, etc., have had notice of the vacancy, and without proof of such notice it is no fault" (*A.-G. v. Leigh*, 1721, 3 P. Wms. 146 (note). Such right of nomination may be lawfully aliened (*A.-G. v. The Master, etc., of Brentwood School*, 1832, 3 Barn. & Adol. 59), and may be conferred by the

founder on another person or body (*A.-G. v. Dean and Canons of Christ Church*, 1821, Jac. 474; 23 R. R. 126).

The management of alms-houses and their property are now subject to the provisions of the Charitable Trust Acts (see also Endowed Schools Acts, 1867, 32 & 33 Vict. c. 56, s. 24). [On this subject, see CHARITIES; CHARITY COMMISSION; TRUSTS.]

Alms-houses, in respect of public buildings, offices, and premises, are exempt from income tax (Property Tax Act, 1842, 5 & 6 Vict. c. 35, s. 6, sched. A). Land tax is not chargeable on any houses or land which, on or before the 23rd March 1693, belonged to the sites of [certain named institutions], or any other hospitals or alms-houses in England or Wales, in respect of rents or revenues payable to them before the 25th March 1693, and disbursed for the immediate use of such hospitals and alms-houses (35 Geo. 315, ss. 25, 26).

This provision applies even when land, formerly the site of an alms-house, is used for a different purpose (*Cox v. Rabbits*, 1878, 3 App. Cas. 473), but tenants holding lands or houses by lease or other grant from such alms-houses are not entitled to claim the exemption. Sec. 29 makes the lands and revenues of such hospitals or alms-houses as were assessed in the fourth year of the reign of William and Mary liable.

The inmates of an alms-house have the right to the electoral franchise when they are appointed for life, and have a freehold interest, legal or equitable, in the sums or houses held by them, although such occupation is in some sense eleemosynary (*Simpson v. Wilkinson*, 1844, 7 Man. & G. 50; *Roberts v. Percival*, 1864, 18 C. B. N. S. 36); but not where they are liable to be removed from room to room by the governors (*Freeman v. Gainsford*, 1861, 31 L. J. C. P. 33), or are removable at pleasure (*Davis v. Waddington*, 1844, 7 Man. & G. 37). See also ALMS; ALMS-PEOPLE; CHARITIES; ELECTORAL FRANCHISE; HOSPITAL; PENSIONER.

[*Authorities.*—Tudor on *Charitable Trusts*, 3rd ed.; Tyssen on *Charitable Bequests*.]

Alms-people.—See ALMS-HOUSE.

Alongside.—Charter-parties generally provide that the cargo is to be brought “alongside” the ship for loading, and taken from “alongside” at discharging, by the charter. In the former case the cargo must be actually brought to the side of the ship, at the charterer’s risk and expense, and if it is placed on the wharf near the ship, unless the shipowner indicates a place for it, the expense of getting it thence to the ship falls on the charterer (*Holman v. Dasnières*, 1886, 2 T. L. R. 607). If the ship, owing to her draught, cannot be fully loaded at the quay, the expense of lightering the cargo to her is borne by the charterer (*Trindade v. Levy*, 1861, 2 F. & F. 441). Similarly, in discharging, the merchant must be ready to take delivery either on the quay, if the ship be lying at it, or in lighters at his own expense. The shipowner’s responsibility for the cargo begins when it is delivered to his servants alongside his ship (*Grant v. Coverdale*, 1884, 9 App. Cas. 475), and ends when it is clear of the ship. And thus loss due to defective ship’s tackle, as the goods are being taken out of the ship, falls on the shipowner (*Avon S. S. Co. v. Leask*, 1890, 18 Sc. Sess. Cas. 280). A charter-party providing for “cargo to be taken from alongside at

merchant's risk and expense as customary," cannot be interpreted, by evidence of a custom, to mean that the shipowner shall bear this expense (*The Nifa* [1892], Prob. 419, where the words "as customary" were in writing and the others in print). Where a charter-party provides for cargo "to be taken to or from alongside the ship at charterer's risk and expense," the charterer is bound to have the appliances for so doing ready, and is liable to the shipowner for any delay caused by default in this respect, unless the loading or discharge is to be "according to the custom of the port," and by that custom the landing and discharge must be liable to be delayed by circumstances, *e.g.*, only one set of lighters being available for discharging in a bar harbour, and vessels having to wait their turn for them (*Wright v. New Zealand Shipping Co.*, 1878, 4 Ex. D. 165; *Postlethwaite v. Freeland*, 1879, 5 App. Cas. 599).

[*Carver, Carriage by Sea*, 250, 251, 463, 618. Scrutton, *Charter-Parties*, 101.]

Altar ; Altarage ; Altar-cloth.—See COMMUNION.

Alternative Counts.—1. Under the old common-law system of pleading, the declaration might join several causes of action in several counts, provided they were between the same parties and in the same rights, and framed in the same form of action: and so long as variances between the evidence and the record could not be amended at *Nisi Prius*, it was necessary to provide against a variance by framing counts to cover every possible contingency which might arise on the evidence (Bullen and Leake, *Proc. Pl.*, 2nd ed., 6). This practice was modified under the Common Law Procedure Acts, and is now superseded as to the High Court, by the Judicature Acts and Rules (see R. S. C., 1883, Order 19, r. 24), under which alternative pleading is permissible, unless embarrassing; and inconsistency between the facts set up in different paragraphs of the claim or defence is not held embarrassing (*In re Morgan, Owen v. Morgan*, 1887, 35 Ch. D. 492).

2. In form, the counts of an indictment are never alternative, and it is a cardinal rule, in drawing an English indictment, not to use the word "or," or any word expressing an alternative, in any part of the indictment. In substance, alternative counts are permissible in an indictment where they do no more than state the same offence in different ways, so as to cover the risk of any variance between pleading and proof, which is not amendable. See AMENDMENT, IN CRIMINAL PROCEEDINGS.

Where the indictment is for felony, it is essential, in practice, that the counts should be alternative in substance, *i.e.* charge the same felony in different ways to meet the facts of the case, or relate to one transaction, and not deal with different felonies (*Castro v. R.*, 1881, 6 App. Cas. 229, 244). Where it is for misdemeanour, as different misdemeanours may be joined in one indictment, this rule does not apply (*Castro v. R.*, 1881, 6 App. Cas. 229); but the practice is open to abuse and subject to judicial comment (see *R. v. King*, 1896, 31 L. J. N. 617); and where it is calculated to cause injustice to the accused, a separate trial of the different classes of charges can be ordered. See JOINDER.

Alternative Limitations.—See LIMITATIONS.

Alternative Pleading.—See PLEADING.

Always Afloat.—Charter-parties often require that a ship shall discharge her cargo “always afloat”; this means that the port to which she is sent to discharge must be one in which she can lie safely with her full cargo and discharge it without touching the ground; and even where these words are not inserted, they are probably implied in the case of large vessels and steam or iron ships. The charterer cannot, by offering to lighten her, compel her master to take her to a port where there would not be enough water for her with a full cargo on board, if the charter-party says that she is to go to “a safe port, or as near thereto as she can safely get and always lay and discharge afloat” (*The Alhambra*, 1881, 6 P. D. 68). But if a special port is named in the charter-party, or agreed to by the parties, and the ship is to go there and “lie afloat at all times of tide,” and the charterer offers to lighten the ship to a reasonable extent, so that she may be able to get to the port, though she cannot do so with a full cargo, the master is not justified in refusing (*Hillstrom v. Gibson*, 1870, 22 L. T. 248). But the words are not construed any more in favour of the shipowner than of the charterer. Thus the ship was chartered to “proceed to the charterer’s loading berth, North Dock, Swansea, and there load always afloat a full and complete cargo; lighterage, if any, necessary to enable steamer to complete loading at North Dock, Swansea, to be at merchant’s risk and expense”; and when the ship arrived at the dock, the tides were “taking off,” and although she could have been fully loaded, lying afloat in the dock, she would not have been able to get over the sill of the dock except by waiting a week; the master accordingly moved her out of the dock before all the cargo was loaded, and finished loading in another dock. It was held that the ship-owners must pay the cost of bringing the goods from one dock to the other, as the mere fear of detention of the ship was no excuse for moving her (*The Curfew* [1891], Prob. 132).

The clause may be made more stringent by adding words, such as “at all times of tide” to “always afloat”: a ship chartered to “go to Sharpness, or so near thereto as she could safely get at *all times of tide, and always afloat*,” was held to have arrived at her destination on getting to an open roadstead in the Severn, which was the nearest place to Sharpness which she could reach in the then condition of tide, and the lay days began to run (*Horsely v. Price*, 1883, 11 Q. B. D. 244).

In the same way, a ship chartered to go to Liverpool, “to discharge in a dock as ordered, on arriving, *if sufficient water*, or so near thereunto as she may safely get, *always afloat*,” was held not to be bound to go, when ordered by the charterer, to a dock which she could not enter when she arrived, owing to want of water (*Allen v. Coltart*, 1883, 11 Q. B. D. 782).

[Carver, 449, 455, 457; Scrutton, 85, 86.]

Amalgamation.—See COMPANY.

Ambassador (according to Murray’s *New English Dictionary*, from the medieval Latin *ambactiator*, agent, noun, from *ambactiare*, to go on a mission; according to Wicquefort, from the Spanish word *embiar*, to send).—The highest rank of public minister accredited to a foreign Court. Other public ministers—envoys extraordinary, **MINISTERS PLENIPOTENTIARY**

(*q.v.*), and CHARGÉS D'AFFAIRES (*q.v.*)—occupy lower positions in the diplomatic hierarchy.

The ambassador's papers, his credentials or LETTERS OF CREDENCE (*q.v.*), are signed and addressed direct by his sovereign, of whom he is the immediate representative, to the foreign sovereign to whom he is accredited, and with whom he has the privilege of personal communication. Simple ministers and *chargés d'affaires* have not this privilege as a right; and the latter are supposed to act as mere agents between Governments, and not to be admitted to personal intercourse with the sovereign at all.

In current practice, however, the distinction only affects matters of precedence. Thus in British ceremonies the ambassador enjoys rank immediately after the royal family, whereas that of ministers plenipotentiary is after dukes and before the marquises. The origin of this latter ceremonial status seems unknown.

The sovereign has a constitutional right of veto in the appointment of ambassadors, which is supposed, however, to be rarely exercised. Still it was so, in 1835, by William IV., who declined to sign the appointment of Lord Durham to the embassy at St. Petersburg.

The sovereign has also the right to refuse to receive an ambassador the person accredited to him.

See DIPLOMATIC AGENTS for the origin, the privileges, and immunities of ambassadors and their suites and servants. See also EXTERRITORIALITY.

Ambiguity.—Double meaning (*Johnson's Dictionary*, by Todd).

There are two sorts of ambiguity, the one "patent" and the other "latent." A "patent ambiguity" is one which is apparent on the face of the instrument. A "latent ambiguity," also called an equivocation, is one not apparent on the face of the instrument, but raised by the introduction of extrinsic evidence.

Examples of Patent Ambiguity.—"I give my horse to my nephew John or William." "I devise Whiteacre to one of the sons of J. S."—J. S. having several sons (2 Vern. 624).

Examples of Latent Ambiguity.—(1) A grant of the manor of S. to J. F., and his heirs, the grantor having two manors of S. (2) A bequest "to my cousin T. S.," the testator having two cousins of that name.

Ambiguity must be distinguished from inaccuracy. "Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator having one leasehold house in a given place, and no other house, were to devise his freehold house there to A. B., the description, though inaccurate, would occasion no ambiguity." That is to say, there would not be two subjects to which the description in the will was equally applicable (Wigram on *Interpretation of Wills*, 4th ed., p. 178).

That parol evidence is admissible to explain a latent, but not a patent, ambiguity is a trite saying, but not an exact one. Parol or extrinsic evidence may be either simply *explanatory of the words*, or *evidence to prove intention*. Explanatory evidence may be and frequently is resorted to in the case of patent ambiguity. Thus, as to wills, the Court has a right to ascertain by extrinsic evidence all the facts known to the testator when he made his will, and thus to place itself in the testator's position in order to ascertain the bearing of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied (*Charter v. Charter*,

1874, L. R. 7 H. L. 377). But *evidence to prove intention* is not admissible in the case of a patent ambiguity, though it is in the case of a latent ambiguity. *Fleming v. Fleming*, 1862, 1 H. & C. 242, is an example of the kind of evidence admissible to explain a latent ambiguity. There the testator bequeathed to his son Edward Fleming a dwelling-house in the occupation of his son John during his life, and at his death to descend to testator's grandson, Henry Fleming and his heirs. The testator had two grandsons named Henry, the claimant who was the son of testator's son Edward, and the defendant who was the son of testator's son John. The following parol evidence was admitted, namely, that the defendant (who ultimately succeeded in the action) from his childhood had resided with the testator, and that he had been frequently heard to say that he should give him the house in question, and also that the testator was not aware that Edward had any son.

Bacon's *Maxims*, reg. 23, p. 90, form the basis of the law on this subject.

The following is an extract therefrom:—" *Ambiguitas patens* is never holpen by averment, and the reason is because the law will not couple and mingle matter of specialty, which is of higher account with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averment, and so in effect, that to pass without deed which the law appointeth shall not pass but by deed.

"But if it be *ambiguitas latens*, then otherwise it is: 'As if I grant my manor of S. to J. F., and his heirs,' here appeareth no ambiguity at all, but if the truth be that I have the manors both of South S. and North S., this ambiguity is matter in fact, and therefore it shall be holpen by averment, whether of them was that the party intended should pass.

"So, if I set forth my land by quantity, then it shall be supplied by election and not averment.

"As if I grant ten acres of wood in Sale, where I have an hundred acres, whether I say it in my deed or no that I grant out of my hundred acres, yet here shall be an election in the grantee which ten he will take."

"Averment" was an old pleading term, meaning to vouch or verify, but the rule has become applicable to evidence generally.

Tapley v. Eagleton, 1879, 12 Ch. D. 683, is an example of a latent ambiguity being determined by election. There the testator, being possessed of three leasehold houses in King Street, bequeathed "two houses in King Street" in trust for P. for life, and then to form part of testator's residuary estate. It was held that P. was entitled to elect which two houses in King Street he would take. The case is distinguishable from *Asten v. Asten* [1894], 3 Ch. 260, where it was apparent on the face of the will that the testator intended to give a particular house to each son, but, owing to the houses not being numbered at the date of the will, it was impossible to say which house the testator intended to give to any of the sons.

Closely allied to this subject is the maxim, "*Falsa demonstratio non nocet*."

Thus, if a legatee is misdescribed in a will, the legacy is not inoperative, provided after rejecting so much as is false the remainder will enable the Court to ascertain with legal certainty the identity of the legatee (see *Ford v. Batley*, 1853, 23 L. J. N. S. Ch. 225).

If a blank is left for the name of a legatee, parol evidence is not admissible to supply it (*Baylis v. A.-G.*, 1741, 2 Atk. 239; *In re Harrison, Turner v. Hellard*, 1885, 30 Ch. D. 390, seems to have turned on the context).

Another maxim bearing on this subject is, "*Veritas nominis tollit errorem demonstrationis*" (Broom's *Legal Maxims*, 6th ed., p. 596). Thus, if a testator devises land to William, the eldest son of the testator's nephew, and the nephew had two sons, John the elder and William the younger, other things being equal, the name will prevail and William will take (see *Garland v. Beverley*, 1878, 9 Ch. D. 213). This maxim only applies, if it is clear that the error is in the demonstration. Therefore, either the name or the description will prevail according as it is reasonably certain that the mistake is more likely to be made in the name than in the description, or *vice versa* (Theobald on *Wills*, p. 225, 4th ed.).

If the description of the person or thing be partly applicable to one object or subject and partly to another, and no case of equivocation arises, parol evidence is not admissible. Thus, in *Doe v. Hiscocks*, 1839, 5 Mee. & W. 363, testator devised lands to his son John H., for life, and from his decease to testator's grandson John H., eldest son of said John H., for life, and on his decease to the first son of the body of his said grandson John H., in tail male, with remainders over. At the date of will, testator's son John H. had been twice married; by his first wife he had one son, Simon; by his second wife an eldest son, John, and other younger children, sons and daughters. Held that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to show which of these two grandsons was intended by the description in the will.

[See further Bacon's *Maxims*, reg. 23; Wigram on the *Interpretation of Wills*, 3rd and 4th eds.; and Elphinstone, Norton, and Clark on *Rules for the Interpretation of Deeds*.]

Amendment in Criminal Proceedings.—1. Criminal proceedings did not fall within any of the old Statutes of *jeo fails* authorising the Court to amend. The indictment, being theoretically the work of the grand jury, was not amendable by the Court, but was occasionally amended by the jury, if a defect was discovered before their discharge (Hawk., P. C., bk. ii. c. 25, ss. 97, 98). 2. Power is given by Statute to amend indictments before verdict—(a) Where a plea in abatement for misnomer, etc., is proved (7 Geo. IV. c. 64, s. 19); see ABATEMENT. (b) Where a formal defect is apparent on the face of the indictment (14 & 15 Vict. c. 100, s. 25). (c) Where there is a variance between the indictment and the evidence, not calculated to prejudice the defence on the merits (11 & 12 Vict. c. 46, s. 4; 12 & 13 Vict. c. 45, s. 10; 14 & 15 Vict. c. 100, ss. 1–3; Arch. Cr. Pl., 21st ed., 142, 236); and see VARIANCES. 3. Where a plea is bad or defective, there is no power to order amendment; but the Court, in treason or felony, will, in the interests of clemency, give judgment of *respondeat ouster*, i.e. leave to put in a fresh plea. In misdemeanour the Court may, on its discretion, either enter judgment for the Crown, or give leave to plead over (see Arch. Cr. Pl., 21st ed., 146).

Amendment of Pleadings.—A party has generally little difficulty in obtaining leave to amend his own pleadings, provided his application is not left to so late a stage of the proceedings that to allow an amendment then would be unjust to his opponent. "Whenever a statement of claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ"

(Order 20, r. 4). And "the plaintiff may without any leave amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying" (Order 28, r. 2). But these rules do not enable the plaintiff to add new parties, or to increase the total amount claimed on the writ, or to change the place of trial (*Locke v. White*, 1886, 33 Ch. D. 308). For any such amendment leave is necessary, which can be granted in a proper case, under Order 16, r. 11, or Order 17, rr. 2 and 4, or Order 28, r. 1. If the writ be specially endorsed, the plaintiff can now amend the endorsement once without leave, even while a summons for judgment under Order 14 is pending; and no fresh summons is necessary (*Roberts v. Plant* [1895], 1 Q. B. 597). A defendant, too, may amend a counter-claim or set-off (but not his defence) without any leave, provided he does so before the expiration of the time allowed for answering the reply and before such answer (Order 28, r. 3). To amend his defence he must always obtain leave. In all these cases, the party amending must pay all costs occasioned by the amendment, unless the Master shall otherwise order (Order 28, r. 13).

But very different considerations apply when a party desires to have his opponent's pleading amended. It is true that, under rule 27 of Order 19, a Master at chambers has power to order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action. And he has further powers under Order 25, r. 4. But it is not easy to obtain an order under these rules. One party has no right to dictate to the other how he shall plead. "Nothing can be scandalous which is relevant" (*per* Cotton, L. J., in *Fisher v. Owen*, 1878, 8 Ch. D. at p. 653). The mere fact that an allegation is unnecessary is no ground for striking it out; nor is a pleading embarrassing merely because it contains allegations which are inconsistent or stated in the alternative (*Re Morgan*, 1887, 35 Ch. D. 492). Unless the pleading as it stands is really and seriously embarrassing, it is often better policy to leave it unamended; the applicant only strengthens his opponent's position by reforming and improving his pleading.

Amends, Tender of.—The Public Authorities Protection Act, 1893, allows the defence of tender of amends before action in any action for damages against any person (or persons or body of persons, corporate or unincorporate), for any act done in pursuance (see IN PURSUANCE) or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority (56 & 57 Vict. c. 61, s. 1; 52 & 53 Vict. c. 63, ss. 1 & 19).

In actions of trespass, *qu. cl. fr.*, the defendant may plead a disclaimer of title, and that the trespass was by negligence or involuntary, and tender of sufficient amends before action brought, as a bar to the action (21 Jac. I. c. 16, s. 5).

In an action of replevin, to an avowry for damage fasant, the plaintiff may plead a tender of amends, either before distress, which makes the taking unlawful, or before impounding, which makes the detention unlawful (*Sir Carpenters' Case*, 1611, 8 Rep. 147a; *Green v. Duckett*, 1883, 11 Q. B. D. 275).

To an action for irregular distress, it is a good defence that tender of amends has been made before action brought (11 Geo. II. c. 19, s. 20).

No actions can be brought for irregularities and wrongs committed in the execution of the Metropolitan Police Courts Act, 1839, if tender of sufficient amends has been made before action brought (2 & 3 Vict. c. 71, s. 52).

A mensa et thoro.—See JUDICIAL SEPARATION.

Amerciaments.—A pecuniary penalty assessed by the peers or equals of the person punished. The entry on the roll of the Court imposing the amerciamento was thus *Ideo est in misericordia*, and the word *misericordia*, or a contracted form of it, was written in the margin. Afterwards the amerciamento, if in the Court of a county, hundred, or manor, was assessed by the AFFEERORS (*q.v.*); but in the superior Courts the practice was for the clerk of the warrants to make estreats of the amerciaments, and to deliver them to the clerk of assize, who in turn delivered them to the coroners to affeer (*La Novvelle Natura Brevium*, Ed. 1581, p. 76a). But an amerciamento upon a sheriff or any officer or minister of the Courts was affeered by the judges (4 Co. Rep. Ed. 1826, p. 221); and was called an Amerciamento Royal. In many cases, however, amerciaments were fixed by custom, and not affeered; thus, in most hundreds and manors, breaches of the Assize of Ale were punished by a fixed amerciamento of fourpence or sixpence. But except where there was a custom to amerce without affeerment, a person whose amerciamento had not been affeered could have by way of remedy a writ under c. 20 of *Mag. Cart.* in the form given in *La Novvelle Natura Brevium* (p. 76b). Counties, hundreds, and towns were frequently amerced for various offences, and the affeerment was made by the coroners in the same manner as were other amerciaments imposed by the superior Courts. It was considered that as coroners were knights elected in full County Court, an affeerment made by them was a sufficient compliance with the Stat. Westm. ii. c. 18. When an amerciamento had been assessed by the affeerors of the Court of a manor or hundred, the lord could distrain for it or sue for it as a debt.

[See Pollock and Maitland, *History of English Law*, vol. ii. p. 512; *Griesley's Case* (Co. Rep. Ed. 1826, p. 221: *De Moderata Misericordia*.]

American Law.—The source of American law is the common law of England. When the governments of the several American colonies on the Atlantic coast became, in 1775 and 1776 or thereabouts, independent of the mother country, they each adopted the common law of England, as it then existed and had theretofore been administered from the foundation of the colonies by the colonial Courts, as the common law of the land. Thus, for example, New York adopted the common law as it existed on the 19th day of April 1775—the date of the battle of Bunker Hill—as the law of the State. All English statutes and decisions in force on that day are therefore now a part of the common law of New York, except as they may have been repealed, modified, changed, or overruled by subsequent legislation or judicial decision in that State. Each of the original States of the Federal Union did substantially the same thing, and equally in the States admitted to the Union since the formation of the present national government, the common law prevails by similar action of the people, except in the case of Louisiana, where the Code Napoleon is

the fundamental law. Many of the great English statutes, like the Statutes of Frauds, of Limitations, of Wills, of Charitable Uses and Trusts, and the like, have been substantially re-enacted in the various States. Each one, therefore, of the forty or more independent commonwealths, which now compose the Federal Union, excepting only the State of Louisiana, has a common law of the land based substantially upon the common law of England. And with differences, for the most part immaterial, and surprisingly slight and insignificant, in consideration of the lapse of more than a century, and the free development of the law along independent lines in nearly half a hundred distinct and separate jurisdictions beyond the sea, it may be said, speaking not too broadly, that the common law of England, as now administered here, is equally the common law to-day of all the American commonwealths, excepting Louisiana. Law students in America accordingly study at the outset Blackstone's *Commentaries*, and are set to read the English statutes and Law Reports. American judges regard with favour the citation of English cases in point, *arguendo* and by way of illustration, and American Reports and text-books contain constant references to them.

In contradistinction to the common law of the several States, above referred to, there is growing up in the Federal Courts a common law of the United States, based equally upon the common law of England and of the several States. It is for the most part of recent development, and has been occasionally criticised, not unnaturally with some severity, in the State Courts. The Federal Courts have a jurisdiction prescribed by the Constitution of the United States, which is in some sort superimposed upon the jurisdiction of the State Courts, sometimes conflicting, sometimes concurrent in a particular State with that of the State tribunals, and at other times exclusive and independent, but in every case defined and limited by the Federal Constitution. In these Courts, both in civil and criminal matters, there has come to be recognised, along certain lines, a common law of the United States, which is certain to assert and reassert itself more and more as the federal jurisdiction grows and develops, particularly in cases involving the law merchant, the law of commercial paper, and the like. Thus, for example, in the case *In re Neagle*, 1890, 135 U.S. 69, it is held that there is a peace of the United States, as distinguished from the peace of the individual State, a breach whereof is possible within the territorial limits of the State, as by an assault upon a federal officer or judge.

The practice of citing American decisions in the English Courts, *arguendo*, has been condemned by the Court of Appeal (unreported case, 1889, 33 Sol. J. 419). These decisions are worthy of all respect as expressing the opinions of very learned lawyers on analogous questions, but they cannot be quoted as decisions binding our Courts on questions of English law. In *Steel v. Dixon*, 1881, 17 Ch. D., Fry, J., at p. 831, observed, that in coming to the conclusion he did on principle, he was much strengthened by the American authorities to which his attention had been called.

Inasmuch as there are American cases and American cases, and because many American decisions are regarded as of no consequence in the United States, the value to English counsel, and the availability for citation in argument of any particular American case, must depend very much upon the Court by which, sometimes upon the time at which, and sometimes upon the judge by whom, it was decided. The relative standing of the various Courts varies essentially, and the strength of a particular Court may vary from time to time. A judge of exceptional ability sometimes adorns and dignifies a bench otherwise mediocre

and commonplace in character; for example, Judges Cooley and Campbell, on the Supreme Court of Michigan; Judge Valentine, on the Supreme Court of Kansas; Judge Dillon, on the Supreme Court of Iowa; or Judge Greene, on the Supreme Court of Appeals of West Virginia. Some Courts are always of commanding influence and authority, some almost always the reverse. Without definite information upon these points, it will be difficult for English counsel rightly to estimate the value of American cases. The decisions of the Supreme Court of the United States are always cited in America as of exceptional value *arguendo*, even in cases in the State Courts where they are not of binding force and authority. The judges of that Court are appointed by the President, and hold their office for life. They are usually men of first-rate judicial capacity and character. The opinions of Chief-Justice Marshall, Chief-Justice Taney, and of Justices Miller, Bradley, and Story, are perhaps pre-eminent. Some of the judges of the Circuit Courts of the United States whose opinions are reported, speak with the utmost authority, for example, Judge (afterwards Justice) Blatchford in patent cases (*Blatchford's Reports*), and Judge Dillon (*Dillon's Reports*). The *Federal Reporter* and the *Reports of Decisions in the United States Circuit Courts of Appeal* are generally cited with respect in America. Among the State Courts the decisions of the Court of Appeals of New York and the Supreme Judicial Court of Massachusetts have perhaps the greatest currency and authority in the other States. The decisions of Chief-Justices Shaw and Parsons in Massachusetts are entitled to much weight, and the present Court is unquestionably the ablest State Court in America. The *New Jersey Law Reports* and the *New Jersey Equity Reports* are exceptionally valuable. The *Pennsylvania Reports* are of unequal merit. Among the older judges in that State, Sharswood, Black, Woodward, and Paxson were conspicuous. The Supreme Court of Louisiana is cited with respect, especially upon commercial questions. The Supreme Court of Appeals of Virginia (*Grattan's Reports*), of South Carolina and of Arkansas, prior to the Civil War (1861-1865), were learned and able Courts. The decisions of the Supreme Courts of California and Colorado, especially in cases involving mining law, are regarded as valuable, so also those of the Court of Appeals of Kentucky in cases involving the title to land. The decisions of the Supreme Courts of Maine, Connecticut, and Wisconsin are usually of very respectable authority. Less can be said, speaking generally, of the decisions of the Supreme Courts of Vermont, New Hampshire, Georgia, Tennessee, Ohio, Missouri, Indiana, and Texas. In these States the decisions of the Court of last resort are, perhaps, of less average merit than in the other States mentioned above. They are certainly of less commanding influence. The careful English barrister will judge of the value of a particular decision, or of a series of reports, somewhat as he finds it or them cited by the Supreme Courts of the United States, in cases arising out of the particular jurisdiction, or by such State Courts as those of New York, Massachusetts, or New Jersey, or by the most approved American text-writers.

The various series of selected American cases are also to be recommended as aids to English counsel in looking up leading American cases on any particular questions. The *American Decisions* (100 vols.) contain a careful selection of leading cases from all the States, for the first one hundred years of American jurisprudence down to about the year 1869. The *American Reports* (60 vols.) continue this selection of cases down to about the year 1888. The editorial work on this series was done by Mr. Irving Browne, the American editor of *English Ruling Cases*.

The *American State Reports* (45 vols., to January 1897) is the current series, carrying the work down to the present time, following close behind the official series of reports in each State. The cases included in these special series of reports are presumedly the best to be found in the reports of each State. They are judiciously annotated, and, taken together, give a good general view of what is best and most valuable in American case law. They include, however, no Federal cases, for which the reader must look to the official reports themselves.

In the United States Digest (old and new series) all the cases of any value, both State and Federal, from the foundation of the Courts down to the year 1887, are accurately digested. The American Digest (annual from 1887 to the present time) contains reference to *all* current cases decided in Courts of last resort. The *Century Digest* (now in course of publication), consolidates both the above-mentioned Digests in one series, and under one alphabetical arrangement, which will make all American case law of easy access to English counsel.

American Securities.—*GOVERNMENT SECURITIES.*—Bonds are the favourite form of securities in the United States, whether issued in connection with Government loans or loans to companies. The United States Government Four per Cent. Funded Loan of 1877 was issued under an Act of Congress of 1870, for the refunding of the national debt. The actual issue was for nearly \$741,000,000, but a number of the bonds have been bought in by the Treasury and cancelled. Some of them are registered; a smaller number being unregistered or coupon bonds. Bonds to bearer or registered bearer bonds can be exchanged for registered certificates, but reconversion is not allowed. The bonds are redeemable at the pleasure of the Government after July 1, 1907.

The United States Government Funded Loan of 1891 consisted of bonds originally bearing $4\frac{1}{2}$ per cent. interest, and redeemable after September 1, 1891, but loans could be continued at a reduction of interest to 2 per cent., redemption being at any time at the option of the United States. Holdings of over \$25,000,000 have been continued in the form of registered bonds. The United States Government Four per Cent. Loan (over \$62,000,000) was issued under an Act of Congress of 1875 and other Acts, being offered for subscription in February 1875 by Messrs. N. M. Rothschild & Sons and J. S. Morgan & Co. It is secured by bearer bonds and by registered bonds of \$1000 and \$5000 each—redeemable at Government pleasure after February 1, 1925. Besides the above are \$100,000,000 Five per Cent. Bonds, issued in November 1894, registered or to bearer, and redeemable ten years after date of issue. In January 1896 tenders were invited for \$100,000,000 Four per Cent. Bonds, redeemable in 19 years. These bonds are the same as those of the previous loan, with the coupons up to February 1, 1896, detached, and are in amounts of \$50 and multiples thereof.

As to the negotiability of foreign bonds according to English law, see *London Joint-Stock Bank v. Simmons* [1892], App. Cas. 201.

RAILWAY SECURITIES.—These rank substantially in the order in which they are described below :—

1. *Receivers' Certificates*, issued by receivers in cases of emergency only, and to keep the property together. They can only be issued under the express order of the Court, which directs them to be paid before the bondholders are paid any part of their debt. The English Courts have power

to authorise a receiver to give a charge in priority to the debentures (*Greenwood v. Algesiras Co.* [1894], 2 Ch. 205).

2. *Prior Lien Bonds*, generally issued to pay debts which have priority over the funded debt, and taken up by the holders of existing bonds, who must consent to their having precedence over existing bonds.

3. *Mortgage Bonds*.—These are equivalent to what in this country we call mortgage debentures secured by trust-deed. The bond acknowledges the debt owing to the bearer, and stipulates for the payment of interest; it specifies the property pledged (generally including the earnings), and contains other stipulations, *e.g.* as to drawings and sinking funds. It also refers to the mortgage deed by which the whole of the issue is further secured. This deed contains further particulars and powers, and is enforceable by foreclosure. There are, of course, in many cases, not only first, but second and other mortgage bonds, and, according to the mode of payment, there are sterling, gold, or currency bonds.

The above are "ordinary mortgage bonds," but the expression includes also (a) *Division bonds*, which give a lien only on a division or section of the road, and not on the entire property; (b) *Extension bonds*, having prior rights upon a new extension and often an additional lien on the remainder of the company's property; (c) *Consolidated or general mortgage bonds*, created when various descriptions of bonds are unified.

Other kinds of bonds are—(1) *Equipment bonds*, issued to acquire rolling stock and secured by a mortgage thereof; (2) *Car trust certificates*, issued to assist in purchasing rolling stock on the "easy payment" system, and secured by a lien thereon (see *Rawle's Car Trust Certificates*); (3) *Land grant bonds*, to be redeemed by the proceeds of sale of the lands granted by Government and pledged as a guarantee for the regular payment of dividends; (4) *Collateral trust bonds*, which are given by a company to trustees, by pledging to them the stock and bond holding of the company in other concerns.

American railway bonds are as a rule not perpetual, but mature after a fixed period from their issue, being often, however, redeemable earlier, at a premium of 5 or 10 per cent. on the capital advanced.

4. *Debentures*, which vary in extent of charge and consequent value. They are bonds without any special collateral security, and are met with in America only in rare instances, and then only in connection with a corporation or company operating under an English charter. In fact, as a bond across the Atlantic is equivalent to a debenture here, so an American debenture seems to be sometimes of little if any greater value than a mere bond or unsecured speciality in this country.

5. *Income bonds*, which carry no interest unless it is earned, thus resembling preferred shares, but, on the other hand, conferring no voting rights; like debentures, because they are not specially secured, but unlike them, because the interest is generally non-cumulative. They are, as a rule, issued only in case of re-organisation. There are also *guarantees* by the larger companies in favour of the bonds of subsidiary concerns.

6. *Shares*, subdivided into (a) *preference*; (b) *common*, or what we should call "deferred" or "ordinary" shares. The only difference between American and English shares which need be noted here is that of the mode of transfer. In England the transfer is by separate deed; in America "the deed or power of attorney is printed on the back of the share certificate, and, the transfer being signed in blank by the registered owner, American railway shares are virtually bearer scrip."

MUNICIPAL SECURITIES.—"The implied power of municipal corporations to borrow money to carry on their ordinary operations is a point upon which American cases are not harmonious. There is, also an irreconcilable conflict amongst the authorities as to the power to issue bonds or other commercial paper, having the privileges and exemptions accorded to that class of commercial securities" (Beach on *Public Corporations*, s. 884); that is to say, the qualities of negotiable instruments, as regards the right of a *bond fide* holder for value to take the same free from intermediate equities. On the other hand, it is "easy for the Legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds" (*Brenham v. German-American Bank*, 1892, 144 U. S. 173).

SECURITIES OF PRIVATE CORPORATIONS.—As regards private corporations, each State has laws peculiar to itself, and a very useful statement of the liabilities of stockholders in the various States is given in Beach on *Private Corporations*, ss. 115-180. But citizens of one State may incorporate a commercial or manufacturing company in another State, even for the purpose of carrying on the entire corporate business in the State where they live (*ib. s. 934*). New Jersey, it appears, is "the favourite State for incorporations," and attracts many fees from the enterprise of New York, where fees are high and laws are not so favourable. West Virginia has been described as the "snug harbour for roaming and piratical corporations." In Ohio, stockholders are liable doubly on their stock, and in California they are liable for all corporate debts. Illinois is a State where incorporation is cheap and corporations are fairly treated; Maine is not so good. Enough has been said to show that investing in American companies' shares should be preceded by strict inquiries of a more or less legal character. The statutes should, of course, be consulted in each case. There are in America certain constitutional provisions affecting corporations, and the Federal Courts to some extent check the growth of unreasonable State legislation. The Federal Government itself has granted a few charters—to national banks and to railways in the territories. The incorporation of national banks was authorised by a general statute in 1863, and other Acts have since been passed. And, irrespective of statute law, incorporation usually releases stockholders from liability for corporate debts, except to the extent of their unpaid subscriptions. The State Legislatures, however, sometimes increase the liability—rarely in the case of railway companies, frequently in the case of manufacturing corporations, and nearly always as regards banks; and this additional liability may be imposed by the State constitution, by the charter, or by a general statute. Stockholders in national banks are subject to the double liability, of paying up the nominal amount of their holdings, "an amount equal to their stock," in respect of corporate debts. Moreover, if at any time the capital stock of the bank becomes diminished by losses, the comptroller of the currency may compel the stockholders to discontinue business or to "assess" themselves to replace the loss.

[See further, Burdett's *Official Intelligence*, 1896; *American Railroads and British Investors*, by S. F. Van Oss; *Manual of the Railroads of the United States* (annual), by H. V. Poor; *Handbook of Railroad Securities* (annual), issued by the *Commercial and Financial Chronicle*, New York; *Public Corporations and Private Corporations*, by C. F. Beach, junior of the New York bar; *Stock and Stockholders*, by W. W. Cook of the New York bar, 3rd ed.; *Municipal Corporations*, by John F. Dillon, Boston.]

Amicus Curiae.—A member of the bar, or other stander-by, who informs the Court when doubtful or mistaken of any fact or decided case (2 Co. Lit. 178).

Ammunition.—See CONTRABAND OF WAR.

Amnesty.—See PARDON.

Amotion.—The name of a proceeding for removing colonial officers and judges for neglect of duty or misbehaviour. 22 Geo. III. c. 7, s. 5 (a), "An Act to prevent the granting in future of any patent office to be exercised in any colony or plantation . . . for any longer term than during such time as the grantee . . . shall discharge the duty thereof in person and behave well therein," after reciting the practice of granting such offices to persons intending to reside in Great Britain, who often farmed them out to the best bidder, provided that from thenceforth no such office should "be granted or grantable for any longer term than during such time as the grantee . . . shall discharge the duties thereof in person and behave well therein." In case of wilful absence, neglect of duty, or other misbehaviour in such office, power was given to the Governor and Council of the colony to amove the officer, subject to a right of appeal to the Crown in Council. One of the chief objects of this Statute was to give the Governor and Council in the colony power to amove colonial officers appointed, as was then the frequent practice, by patent under the royal sign manual, to hold office during pleasure, and removable by the Crown on the advice of the Secretary of State. In *Ex parte Robertson*, 1858, 11 Moo. P. C. 288, it was held that the Act did not apply to an office created by a colonial Act empowering this Governor to nominate proper persons, under his hand seal, to hold "during the pleasure of the Governor," even though, in the particular case, the office had been granted by patent under the great seal of the colony, and that it only applied to offices held by patent for life, or a term certain (see also *Montagu v. Governor-General of Van Diemen's Land*, 1849, 6 Moo. P. C. 491). In *In re Cloete*, 1854, 8 Moo. P. C., the leave to appeal from a removal from office held under a colonial patent does not seem to have been granted under 22 Geo. III. c. 75 (A) (see also 54 Geo. III. c. 61; and S. L. R., 1871), but under the terms of the local ordinance creating the office. In *Willis v. Gipps*, 1846, 6 St. Tri. N. S. 311, it was held that 22 Geo. III. applied to judicial officers, but that the order of amotion was bad, because no notice of the proceedings, or opportunity of answering the charges, had been given to the accused judge. The Colonial Office, acting upon the advice of the law officers (Atherton and Palmer), has held that amotion by the Governor and Council, under 22 Geo. III., is applicable to colonial judges who hold office in colonies with responsible government during good behaviour, subject to a power of removal on the address of both Houses of the local Legislature, but only in cases where the condition of good behaviour has been broken. The Tasmanian judges, in *Judge Barr's* case, contended that such a power of amotion was inconsistent with the tenure during good behaviour, and asked that the question should be referred to the Judicial Committee; but this was refused (Todd, *Parliamentary Government in the Colonies*, 2nd ed., 838). A similar view was acted upon in *Judge Boothby's* case (*ibid.*), but the question does not appear to have been judicially determined. •

Where the judges hold office during the pleasure of the Crown, as in colonies not possessing responsible government, independently of 22 Geo. III. c. 75, a colonial Legislature may petition the Crown in Council for the removal of a judge; the petition will then be referred to the Judicial Committee (*q.v.*; and see PRIVY COUNCIL), or a general committee, who will investigate the charges, and report whether he should be removed or not. This method is described as inconvenient in the Memorandum of the Lords of the Council on the Removal of Colonial Judges, 1870 (6 Moo. P. C. N. S., App.). It was adopted *In re Sanderson*, 1847, 6 Moo. P. C. 38, where the committee declined to advise a dismissal. Again, the Governor, acting under the powers given in his commission and instructions, may, subject to his own responsibility for so doing, suspend a judge holding during pleasure until the pleasure of the Crown be taken. Such an order of suspension has generally, but not always, been referred to the Judicial Committee for report, before the Crown, on the advice of the Secretary of State, removed the judge or revoked the suspension (see the Memorandum cited above). The Governor, before proceeding to suspension, should give the accused person full notice of the charges against him, and call upon him for his answer, and hear it (*ibid.*). This method, and a motion under 22 Geo. III., are recommended by the Lords of the Council as more convenient than a petition from the colonial Legislature to the Crown in Council. Such a power of suspension would not appear to apply to judges holding during good behaviour, unless expressly given by the Legislature, as in Victoria by the Supreme Court Act, 1890, s. 14. Lastly, as to such judges holding during good behaviour, subject to a power of removal, on address of both Houses, the British North America Act, 1867, 30 Vict. c. 3, s. 99, provides, as to the Dominion of Canada, that "the judges of the superior Courts there shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons." There would appear to be no appeal from such a removal; but in South Australia, where the tenure was during good behaviour, subject to the power of Her Majesty to remove on address from both Houses, the Secretary of State, in *Judge Boothby's* case, refused, in the particular circumstances, to advise the Crown to remove the accused judge without inquiry, and recommended that it should be referred to the Judicial Committee to consider and report. The colonial Legislature, however, refused to present a case to the Committee.

[See further on this subject, Todd, *Parliamentary Government in the Colonies*, and *Parliamentary Government in England*.]

Amount Secured.—The exact words occur in the Stamp Act, 1891 (54 & 55 Vict. c. 39), with reference to mortgages. Sec. 1 imposes on the instruments mentioned in the first schedule to the Act the stamp duties specified in the schedule, there being charged on a "mortgage bond, debenture, covenant (except a marketable security otherwise specially charged with duty), and warrant of attorney to confess and enter up judgment," a scale of duties in respect of sums up to, but not exceeding, £300, and, when the amount is over £300, "for every £100, and also for any fractional part of £100 of the *amount secured*," the sum of 2s. 6d. As regards a "collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purposes," a duty of 6d. only is payable "for every £100, and also for any fractional part of £100, of the *amount secured*." In the

case of equitable mortgages double the last-named duty is charged. In respect of reconveyances, releases, discharges, surrenders, resurrenders, warrants to vacate, or renunciations of any such securities, the expression "total amount or value of the money at any time secured" is for obvious reasons substituted for "amount secured." To be within the Act a mortgage must be a "security by way of mortgage for the payment of any definite and certain sum of money" (see the definition in s. 86). The words "definite and certain sum" relate to the amount secured, not to the certainty of payment (see *Canning v. Raper*, 1843, 1 El. & Bl. 164, and other cases cited, Alpe, 169), and mean the principal sum only—not including charges which the law allows a mortgagee to add to his principal, such as interest (unless capitalised), expenses, bankers' commission, premiums on insurance (though bearing interest), and redemption bonuses on debentures (Alpe, 170, and s. 88 (3)). In the portion of sched. 1, relating to "marketable securities," the duty is imposed in respect of "the money thereby secured." In s. 55 (2) the words used are "amount due . . . for principal and interest upon the security." As to the stamps on securities for current accounts and other future advances, see s. 88. The expression "amount for the time being secured" occurs in the Building Societies Acts, 1874 (s. 15), and 1894 (s. 14), as to which, see *Neath Building Society v. Luce*, 1890, 43 Ch. D. 158; *Ex parte Johnson and Greenwood*, 1890, 45 Ch. D. 463; Wurtzburg on *Building Societies*, 3rd ed., 70, 71. In the Conveyancing Act, 1881, "mortgage money means money, or money's worth, secured by a mortgage" (s. 2 (6)). See further, *The Law of Stamp Duties*, by E. N. Alpe, barrister-at-law, 4th ed.

Amusement (Place for).—See PUBLIC ENTERTAINMENT.

Analogues of Contraband.—See CONTRABAND.

Analysis.—With the growth of scientific chemistry, chemical analysis has become an almost indispensable means of obtaining truth in judicial inquiries, especially in civil or quasi-criminal proceedings, and of testing the composition of all substances which it is sought to bring within the scope of the laws relating to customs or excise, and the sale of food for men or cattle, drugs, poisons, seeds, and manures.

Statutory provision for chemical analysis is made—(1) By the Sale of Food and Drugs Acts, 1875 and 1879 (38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30); and the Margarine Act, 1887 (51 & 52 Vict. c. 29). (2) By the Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56, ss. 4, 5), as to manures and cattle food. (3) By the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 70), as to analysis of water alleged to be polluted. (4) By the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113, s. 36), as to the quality of the water supplied by the Metropolitan Water Companies, made by an examiner appointed by the Local Government Board.

Government Analysts.—There is no special statutory provision for the appointment of official analysts, or the form or effect of evidence of analysis by experts, in the case of indictable offences, though in the case of charges of murder by poison this form of evidence is essential. The ordinary rules of evidence apply, and the article analysed must be traced through all the hands by which it has passed to the analyst, to make its identity certain,

and exclude the possibility of its having been tampered with. The method of analysis is dictated by chemical science, and guarded by medico-legal prudence in the interests of truth (see Taylor, *Medical Jurisprudence*, 3rd ed., pp. 206-210). For the purposes of public prosecutions the Home Office employs an official analyst.

The Inland Revenue department has a laboratory at Somerset House, and employs chemical officers to analyse for purposes of excise, and the Court, original or appellate, before which comes any case under the Sale of Food and Drugs Acts can, at the request of either party, send a sample to the Inland Revenue chemists at Somerset House for official analysis (38 & 39 Vict. c. 63, s. 22).

The Customs department, in addition to its general powers, has a special power to cause analyses to be made of all tea imported into and landed as merchandise in any United Kingdom port (38 & 39 Vict. c. 63, ss. 30, 31), to see whether it is adulterated, exhausted, or unfit for human consumption (see *Roberts v. Egerton*, 1874, L. R. 9 Q. B. 494).

Under the Fertilisers and Feeding Stuffs Act, 1893, 56 & 57 Vict. c. 56, the Board of Agriculture must appoint a chief agricultural chemist, who must not engage in private practice. His remuneration is settled by the Treasury, and payable out of the public purse. His duties are to analyse fertilisers or feeding stuffs, in cases where seller or buyer objects to the certificate of the district analyst. His certificate is evidence, but not conclusive, as if required he must be called as a witness.

Analysts of Local Authorities.—The following authorities have power to appoint, and if required by the Local Government Board, must appoint, a public analyst for their respective districts for the purposes of the Sale of Food and Drugs Acts, 1875 and 1879, and the Margarine Act, 1887:—

1. In the county of London, the Commissioners of Sewers for the City, and the vestries and district Boards, under the Metropolis Local Management Acts.

2. In municipal boroughs, having not less than 10,000 population, the town council, subject to a power of employing the analyst for an adjoining borough or county (1875, ss. 10, 11).

3. In counties the County Councils (except as to boroughs lying within them and falling under head 2) (38 & 39 Vict. c. 63, s. 10; 51 & 52 Vict. c. 41, s. 3 (x)).

Under the Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56), County Councils must, and County borough Councils may, appoint or combine with other Councils in appointing district agricultural analysts for a whole county or districts of it, or for a combination of counties or boroughs. They are paid out of the county, borough, or district rate, and their duty is to analyse and certify fertilisers and feeding stuffs on the demand of the buyer, in accordance with the regulations of the Act and the Board of Agriculture, 23rd Dec. 1893 (Statutory Rules and Orders, 1893, p. 295). The certificates of these local analysts are made sufficient evidence of the matters therein stated, subject to the right of insisting on the analyst being called as a witness (38 & 39 Vict. c. 63, s. 21; 56 & 57 Vict. c. 56, s. 5 (5)).

[See also Cripps-Day, *Adulteration*, 1895; Bell and Scrivener, *Sale of Food and Drugs*, 2nd ed., 1894; Bartley, *Adulteration of Food*, 1895; Stevenson and Murphy, *Hygiene and Public Health*, 1894, vol. iii. pp. 134-143.] See ADULTERATION.

Anatomy.—See 2 & 3 Will. iv. c. 75, by which the practice of dissecting human corpses is regulated and a licence required for it.

Ancestor.—"Ancestor," says Lord Coke, "is derived of the Latine word *antecessor*; and in law there is a difference between *antecessor* and *prædecessor*. For *antecessor* is applied to a natural person, as *I. S. et antecessores sui*; but *prædecessor* is applied to a body politique or corporate, as *Episcopus London, et prædecessores sui*." (Co. Lit. 78, b.) The word is in common usage restricted to lineal ancestors; but in the language of the old writs it was restricted to father, mother, brother, sister, uncle, aunt, niece and nephew; for the writ of *mort d'ancestor* was founded upon the seisin only of those relatives. (Fitz. N. B. 195, c.) Its ordinary use is to signify any person, either in a direct or a collateral line of ascent in the pedigree, from whom hereditaments may descend to such person's heir. If, upon the death of the ancestor seised of lands in fee-simple, a stranger should obtain possession of the lands before the heir, his act is not properly styled a disseisin but an abatement. (Co. Lit. 277, a.) By the common law, a lineal ancestor was not capable of being heir to any of his issue (Lit. s. 3.) By the Descent Act, 3 & 4 Will. iv. c. 106, s. 6, this is now altered; and in default of issue of the purchaser, his nearest lineal ancestor is heir, in preference to any collateral claiming through such ancestor, or by reason of default of issue of such ancestor. But in order that the ancestor may be capable of succeeding as heir to his issue, so far as regards lands situate in England, such issue must be legitimate according to the law of England; and it is not sufficient that such issue shall be legitimate according to the law of the country in which such issue was born, having regard to the domicile of the parents at the time of the birth. (*In re Don's Estate*, 1857, 4 Drew, 194.) In that case a son of parents domiciled in Scotland, born out of wedlock, but made legitimate, according to the law of Scotland, by the subsequent marriage of his parents, had died seised in fee-simple, by purchase, of land in England, after the coming into operation of the Descent Act. On his death, intestate and without issue, the father claimed to be entitled to inherit the land, as heir to his son, by virtue of sec. 6 of that Act. It was held that he was not so entitled, although, in respect to personal status, the son to whom he claimed to inherit was legitimate; upon the ground that for this purpose the law of England requires something more than the personal status of legitimacy; namely, that the qualification for the legitimacy shall be sufficient according to the law of England; and birth *ex justis nuptiis* is an essential feature of such qualification. (Co. Lit. 7, b; *Doc v. Vardill*, 1840, 7 Cl. & Fin. 895.) See ANTENATUS; LEGITIMACY.

Anchor.—It is not within the scope of this article to do more than state the provisions of law which concern anchors, and the liability imposed on the shipowner in respect of them. For a description of them, from the point of view of mechanics or navigation, reference should be made to Falconer's *Marine Dictionary*, 1805, and McCulloch's *Dictionary of Navigation*, 1888.

An anchor is a necessary part of a ship's equipment, and no vessel is seaworthy without a proper complement of them. All anchors used in British ships are required, under penalty, to be of a proper quality and strength. They are required to pass a test, prescribed by the Board of Trade, which may be either that specified in the Chain Cables Act,

1874, s. 5, or any other, not less than the Admiralty test, s. 6, which is, roughly speaking, that the test of anchors in tons shall be proportioned to their weight in hundredweights $\frac{1}{2}$ both a breaking and a tensile strain (Bedford, *Sailor's Pocket Book*, p. 473). Certain corporations are allowed, under licence of the Board of Trade, to set up establishments where anchors can be tested (Chain Cables Act, 1864, s. 2). All cables and anchors must be tested by qualified persons and stamped, and buying or selling them untested and unstamped entails a penalty up to £50 (1874, s. 7). No anchor is to be bought or sold for the use of a British ship, exceeding 168 lbs. in weight, unless it has been thus previously tested and stamped, and breach of this provision is a misdemeanour (Chain Cables Act, 1874, s. 3); and every contract for the sale of a chain cable is deemed to imply a warranty to that effect (s. 4). If a ship is alleged to be unseaworthy, and is detained by the Board of Trade, the state of its cables and anchors is to be inquired into (s. 5). All anchors are to be marked by their manufacturers with their names or initials, and a progressive number, and the weight of the anchor (M. S. A., 1894, s. 543). Dealers in marine stores, *i.e.*, *inter alia*, anchors and cables, must have their name and trade painted upon their shops, must keep proper books showing all the stores passing through their hands, may not buy marine stores from persons under sixteen years of age, and may not cut up cables without a written permit from a justice of the peace, and advertising that they have such permit (ss. 538-542). Also every emigrant ship must carry three proper bower-anchors, to the satisfaction of the emigration officer (s. 290).

In navigating a ship the anchor must be carried in a safe position, or, in case of collision with another vessel, the shipowner will be liable for all the damage so caused. Thus a dumb barge, by the negligence of those on board her, collided with a schooner moored in the Thames, but no damage would have been done if the anchor of the schooner had not been hanging from her bow, not stock awash, but above the water, contrary to the Thames Rules; the schooner was held to blame as well as the barge (*The Margaret*, 1881, 6 P. D. 76). But if a compulsory pilot is on board, the position of the anchor is a matter within his province, and the shipowners are not liable for damage caused thereby (*The Monte Rosa* [1893], Prob. 23). Vessels anchoring within a roadstead or anchorage of a port are liable to pay *anchorage* for so doing. This is originally a right of the Crown, and subjects can only claim it by special grant (*Free Fishers of Whitstable's Case*, 1869, L. R. 4 H. L. 266). A ship slipping her anchor to avoid collision with another ship, which has approached too close for safety, can recover the value of that anchor from the other vessel (*The Arizona*, Admiralty Division, Jan. 1896; Marsden, *Collisions*, p. 27). For duties of anchored ships, see COLLISION. Slipping an anchor for the safety of a ship gives the shipowner a claim to general average contribution. See AVERAGE.

Ancient Demesne.—There are two principal senses in which the phrase ancient demesne is commonly used, which, though closely connected, need to be distinguished—(1) It is applied, by way of predicate, to distinguish the manors of ancient demesne; (2) It is used substantively, to denote the tenure by which the socage tenants of those manors held their lands. It is not properly used to denote the tenure by which the manors, or the demesne lands thereof, were held. (Bro. Ab. *Auncien Demesne*, pl. 32.) The expression "frank-fee" is commonly, but not very aptly, applied to the latter tenure, in distinction from the tenure of the socage

tenants. The manors of ancient demesne are those which were in the hands of the Crown, in the reign either of Edward the Confessor or of William the Conqueror, and are styled in Domesday, *Terræ Regis Edwardi*, or *Terræ Regis*. (4 Inst. 269.) They are styled by Lord Coke (2 Inst. 542) the "ancient demesnes of the Crown of England"; and were reputed by the law to be ancient patrimonial possessions of the Crown, which were properly kept in the king's hands, to aid in providing a revenue for maintaining the royal dignity. The socage tenants of these manors were commonly styled the tenants in ancient demesne; and, when used in this sense, the phrase denotes a species of socage tenure, distinguished from common socage by certain peculiar privileges attached to it. These privileges were six in number, and are now all obsolete. The only one of them which requires notice, by reason of its possible bearing upon ancient titles, is the first of those enumerated by Lord Coke, namely, that no action relating to their lands could be maintained in any Court, except the Court Baron of the manor of which they held. Such actions were commenced by a writ, styled a writ of right close, or little or petty writ of right close; as to which, see Fitz. N. B. p. 11; Booth, *Real Actions*, p. 87. If the manor was in the king's hands, the writ was directed to his bailiffs of the manor; but if the manor had been granted to a subject, the writ was directed to the lord. (4 Inst. 469.) The right to prosecute an action in the manorial Court implied the right to compromise it; and, by consequence, the right to levy a fine there. (1 Cr. Fi. & Rec. 86.) A fine of lands held in ancient demesne could not properly be levied in the Court of Common Pleas; but if in fact levied there, the tenure was thereby suspended, and the lands became frank-fee, unless and until the fine was reversed upon a writ of disceit brought by the lord of the manor. (1 Roll. Ab. *Auntient Demeasne*, K. pl. 1.) It was doubtful whether, after such reversal, the effect of the fine was wholly destroyed, even as regards the estate of the parties, or whether it merely restored the ancient tenure, without affecting the estate. (1 Bac. Abr. p. 231.)

The writ of right close, and the writ of disceit, were both abolished by the Real Property Limitation Act, 1833, 3 & 4 Will. iv. c. 27, s. 36. The Fines and Recoveries Act, 1833, 3 & 4 Will. iv. c. 74, s. 5, seems in effect to enact that a fine of lands held by the tenure of ancient demesne levied in the lord's Court, subsequently to an unreversed fine levied in the superior Court, shall be valid, notwithstanding the alteration of the tenure by the fine previously levied. It is to be observed that the lord's Court had no power to make proclamations; and, therefore, that no fine there levied could take effect to bar an estate tail, by virtue of the Statutes of Fines. (*Hunt v. Bourne*, 1 Ann, 1 Salk., at p. 340, res. 3.)

The tenure of ancient demesne, properly so called, being a species of socage tenure, is of course freehold. But in manors of ancient demesne an ambiguous species of tenure is often found, combining some characteristics of freehold with some of copyhold tenure, requiring admittance in order to perfect an assurance of them, which assurances are sometimes effected by surrender and sometimes by deed, and being held by copy of Court roll, and according to the custom of the manor, but not being expressed to be held at the will of the lord. They are usually styled customary freeholds. It was long considered doubtful whether they were, in law, freehold or copyhold. But it seems now to be settled that the tenure is copyhold, and that the ordinary copyhold law is applicable to them. (See on this subject, *Bishop of Winchester v. Knight*, 1717, P. Wms. 406; *Stephenson v. Hill*, 1762, 13 Burr. 1273; *Burrell v. Dodd*, 1803, 3 Bos. & Pul. 378; *Doe*

v. Huntington, 1803, 4 East, 271; *Roe v. Vernon*, 1804, 5 East, 51; *Doe v. Danvers*, 1806, 7 East, 299; *Brown v. Rawlins*, 1806, 7 East, 409; 8 R. R. 652; *Duke of Portland v. Hill*, 1866 L. R. 2 Eq. 765.)

Ancient Inclosures.—See INCLOSURES.

Ancient Lights.—The expression “Ancient Light” is used to denote a legal right which the owner of a house or other building has to receive the light which will naturally enter his windows or other similar apertures flowing to them across his neighbour’s land; and as a consequence of this right an obligation is imposed on the neighbour not to obstruct the light. It is the undoubted right of every man who has a house to open any windows he pleases, and he does no wrong to his neighbour by so doing, however close the house may be to the land of the latter. By opening a window he immediately obtains a flow of light into his house, and he has a common law right to that light, just as he has to air or water which naturally comes upon his premises. This right, however, is not a right to *ancient* light, and the neighbour is not debarred from his ordinary right to build on his land even though he obstructs the light; but by the common law, if a house had stood and a window had been opened for so long a time that the memory of man ran not to the contrary, the light became an *ancient* light, which the law would protect, and it was said that the owner of the house had a right to light or an ancient light by prescription (see **PRESCRIPTION**). Thus the common law remained for centuries till the Prescription Act (2 & 3 Will. IV. c. 71) was passed, by which it was specially provided (s. 3), with reference to light as distinguished from all other easements, that “when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing.”

This clause of the Act gave rise to considerable litigation, one much debated point being its effect on the common law—whether the common law principle was entirely superseded thereby, or whether it remained concurrently with the statutory provision. The leading and indeed the ruling case on the point is *Tapling v. Jones*, 1865, 11 H. L. C. 290, in which Lord Westbury, C., discussed the principle of ancient lights, and laid it down that the Act had entirely new founded the law of prescription as to light, that the common law was abrogated, and that the right to what is called an “ancient light” now depends upon positive enactment; he held that it is now matter *juris positivi*, and that it does not now require, and, therefore, that it ought not to be vested on, any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor. This decision depends entirely upon the special form of words employed by the Legislature, and in no way affects other easements than light, and it has not been accepted with complete acquiescence, although a decision of the House of Lords (*Lanfranchi v. Mackenzie*, 1867, L. R. 4 Eq. 421). Doubtless, however, unless the Legislature should again intervene, the principles enunciated by Lord Westbury, and held by the House of Lords, must prevail.

As the opening of a new window to receive the light which will enter it from the adjoining land of a neighbour is not unlawful, and the continual enjoyment of the light for twenty years invests the owner of the house with a right to prevent his neighbour building, it follows that the only preventive remedy open to the neighbour is to erect a building or a screen to obstruct the light before the right is acquired against him. This has sometimes been termed his "right to obstruct," which is obviously an erroneous expression. "If," said Lord Westbury, *ubi supra*, "my adjoining neighbour builds upon his land and opens numerous windows which look over my gardens or pleasure-grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right of building or raising any erection I please on my own land, unless that right has been by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbour." From the principles above set out, it follows that an ancient light is not lost or impaired, if the owner increases the size of his windows or opens new ones. The only means of preventing the acquisition of an increased right or a new easement is for the adjoining owner to erect a screen to obstruct if possible the enlarged portion or the new windows without interfering with the ancient light. See AIR; LIGHT.

[See Gale on *Easements* and Goddard on *Easements*.]

Ancient Meadow.—Meadow which has not been broken up for twenty years (*Murphy v. Daly*, 1860, 13 Ir. Com. L. R. 239).

Ancient Monuments.—Provision is made for the better protection of ancient monuments by the Act 45 & 46 Vict. c. 73 (The Ancient Monuments Protection Act, 1882). The expression "ancient monument" includes the site of such monument and such portion of land adjoining the same as may be required to fence, cover in, or otherwise preserve from injury, the monument standing on such site, also the means of access to such monument (s. 11).

The owners of a monument may by deed constitute the Commissioners of Works guardians thereof, and they then have the right to inspect and maintain it. The owner's estate and title is not thereby affected (s. 2), except that the owner has relinquished his right of ownership, so far as relates to any injury or defacement of the monument (s. 6). Where an owner is a minor, or of unsound mind, or a married woman, the guardian committee or husband, as the case may be, of such owner, is the owner for the purpose of the Act (s. 9). Everyone deriving title to an ancient monument from, through, or under any owner who has constituted the Commissioners its guardians, shall be bound by the deed executed by the owner for the purpose (s. 9). Sec. 3 empowers the Commissioners to purchase ancient monuments. Any person may (s. 4) by deed or will give, devise, or bequeath an ancient monument to the Commissioners. By sec. 6 penalties are imposed for injuries or defacement of ancient monuments.

Ancient Rent.—See ACCUSTOMED RENT, and cases and authorities there cited.

And.—In a will, the word “and” is sometimes construed “or”; this is generally done to favour the vesting of a legacy (*Jarman on Wills*, i. 483; *Hetherington v. Oakman*, 1843, 2 Y. & C. C. 299; *Hawes v. Hawes*, 1747, 1 Ves. Sen. 13). As to the cases in which, in gifts over, “and” will be read “or,” see Theobald, *Wills*, 570; and see Stroud, *Jud. Dict.*

Anglican Communion.—See CHURCH OF ENGLAND.

Angling.—See POACHING; and as to nuisance in regard to rights of, see *Fitzgerald v. Firbank*, 9th December, 1896, L. T. 115.

Animals.—1. *LIABILITIES IN RESPECT OF ANIMALS*:—

Strays.—The owner or bailee of cattle, horses, or such animals as are usually kept in restraint (not including dogs, pigeons, and the like (*Saunders v. Teape*, 1884, 51 L. T. 263), is liable for damage done by them if they are allowed to stray (*Ellis v. Loftus Iron Co.*, 1874, L. R. 10 C. P. 10), provided that the damage is the natural and probable consequence of their escape, but he is not liable for injuries of a kind there was no reason to expect the escaping animals to occasion (*Cox v. Burbidge*, 1863, 13 C. B. N. S. 430). There is no liability, apart from negligence, for damage done by cattle which stray from a highway when being lawfully driven along it (*Tillett v. Ward*, 1882, 10 Q. B. D. 17). See FENCES. To allow horses, cattle, sheep, goats, or swine to stray or lie on the highway, is an offence under the Highway Act, 1864, s. 25; and, under the Towns' Police Clauses Act, 1847, s. 24, cattle straying in a “street” may be impounded.

Mischievous or Vicious Animals.—Anyone who keeps an animal of a savage or mischievous species, as a lion, monkey, or elephant (*Filburn v. People's Palace Co.*, 1890, 25 Q. B. D. 258), is bound to keep it safely at his peril, and apart from any question of negligence (see *F. Fletcher v. Rylands*, 1866, L. R. 1 Ex. 265 (H. L. 330, and Pollock on *Torts*, ch. xii.). But the keeper of animals which are not, by the nature of their species, accustomed to attack mankind, as dogs, cattle (*Hudson v. Roberts*, 1851, 6 Ex. Rep. 697), or horses (*Hammack v. White*, 1862, 11 C. B. N. S. 588), is not in general liable for injuries due to their viciousness, unless he has notice of their dangerous character (*scienter*) (*Worth v. Gilling*, 1866, L. R. 2 C. P. 1). And the notice must be notice that the animal in question has attacked or is likely to attack mankind (*Osborne v. Choqueel* [1896], 2 Q. B. 109). Injuries by dogs to cattle, horses (*Wright v. Pearson*, 1869, L. R. 4 Q. B. 582), or pigs (*Child v. Hearn*, 1874, L. R. 9 Ex. 176), or sheep, are excepted from the general rule by 28 & 29 Vict. c. 60, which dispenses with the necessity of proof of “a previous mischievous propensity,” or knowledge of it, or negligence, in order to charge the owner. In certain cases the Act makes the occupier of premises where the dog is kept liable for injuries caused by it.

2. *DISEASED ANIMALS; PREVENTION OF DISEASE; IMPORTATION OF FOREIGN ANIMALS* (see the Diseases of Animals Act, 1894, which consolidates a number of earlier Statutes). The Statute (s. 4) requires any person who has possession or charge of animals (as defined by the Act), which are suffering from disease, to keep them separate from animals not so suffering. It is an actionable wrong to negligently allow animals which are affected with a contagious disease to come into contact with those of

other owners (*Cooke v. Waring*, 1863, 2 H. & C. 332), but the mere fact of sending such animals to market constitutes no warranty of their freedom from disease in respect of which a buyer can recover (*Ward v. Hobbs*, 1878, 4 App. Cas. 13⁹).

3. *KEEPING ANIMALS* on the premises so as to be injurious to health, and keeping swine in towns; see the Public Health Act, 1875, ss. 44, 47, and 91; the Public Health (London) Act, 1891, ss. 17 and 18; and, as to the Metropolitan Police District, 2 & 3 Vict. c. 47, s. 60 (5).

4. *CRUELTY TO ANIMALS* is dealt with by the Statute 12 & 13 Vict. c. 92. The Act does not protect wild animals in captivity, as rabbits (*Aplin v. Porritt* [1893], 2 Q. B. 57), or lions (*Harper v. Marcks* [1894], 2 Q. B. 319). Dishorning cattle is an offence within it (*Ford v. Wiley*, 1889, 61 L. T. 74). The Statute forbids bull- and bear-baiting, and cock-fighting; and these acts, and also fighting, baiting, or worrying animals generally, are also forbidden by the Towns Police Clauses Act, 1847, s. 36. See *VIVISECTION*.

5. *INJURIES TO ANIMALS*.—An action lies by the owner or bailee of an animal for any injury caused to it either wilfully or negligently by the act of another, as in the case of any other personal property. Maliciously killing or maiming cattle or other animals is an offence under the Malicious Injury to Property Act, 24 & 25 Vict. c. 97, ss. 40 and 41. Thefts of animals and killing animals for the purpose of theft are in certain cases punishable under the Larceny Act, 24 & 25 Vict. c. 9, ss. 10 to 26. Drugging animals without the owner's authority, or reasonable cause, is an offence under 39 & 40 Vict. c. 13. By the Injured Animals Act, 1894, a police-constable is authorised to cause any horse, mule, or ass, which is so severely injured that it cannot without cruelty be led away, to be slaughtered. It appears to be a condition precedent to the authority of the constable to act, that he should first procure a veterinary surgeon's certificate. See *WHALE*.

See also *AGISTMENT*; *DISTRESS*.

CARRIAGE OF ANIMALS.—A common carrier of animals is not liable for injuries which an animal sustains through its own vice or unruliness, if he provided a suitable carriage for it, and was not guilty of any negligence which led to the injury. A carriage to be suitable must secure the animal from injury from the ordinary incidents of the journey, including fright occasioned by its novel position and passing objects (*Blower v. G. W. Ry. Co.*, 1872, L. R. 7 C. P. 655). If the injury is due to the owner having supplied deceptive apparatus to secure the animal, *e.g.* a dog's collar which can be slipped, the carrier is not liable (*Richardson v. N. E. Ry. Co.*, 1872, L. R. 7 C. P. 75).

Railway and canal companies have the liabilities of common carriers in respect of animals which they carry (*Blower v. G. W. Ry. Co.*, *supra*; *Dickson v. G. N. Ry. Co.*, 1886, 18 Q. B. D. 176), subject to any just and reasonable special contract which is in writing, and is signed by the consigner or deliverer (Ry. & Canal Act, 1854, s. 7). They must afford reasonable facilities for carrying animals, including dogs (*Dickson v. G. N. Ry. Co.*, *supra*), and cannot, by any notice, limit their liabilities for injuries or loss occasioned by the negligence of their servants (s. 7). As to damages for not affording reasonable facilities, see *Waller v. Midland G. W. Ry. Co.*, 1879, 4 L. R. Ir. 376. Their liability is limited to the following sums in respect of each animal—horse £50, neat cattle £15, sheep or pigs £2, unless at the time of delivery higher values of the animals are declared, and in that event a reasonably (*Harrison v. L. B. & S. C. Ry. Co.*, 1862,

31 L. J. Q. B. 113) higher rate may be charged (s. 7). The company has the same liability if, in the course of its contract it carries by sea upon another owner's vessel (Regulation of Railways Act, 1871, s. 12). As to through bookings partly by sea, see Regulation of Railways Act, 1868, s. 14. For regulations respecting food and water, and the movement and transit of animals generally, see Diseases of Animals Act, 1894, and the orders thereunder.

If an animal is not fetched at the conclusion of the journey, it may be put at livery and the cost recovered from the consignee or consignor (*G. N. Ry. Co. v. Swaffield*, 1874, L. R. 9 Ex. 132). See CARRIER.

Annates.—This word is and was sometimes used in Acts of Parliament as the equivalent of First-Fruits (see 25 Hen. VIII. c. 20 and 23). Annates, *Primitiæ* or *First-Fruits*, are the profits by the year of every spiritual living.

[*Authorities.*—Godol., *Rep. Can.* p. 335; Phillimore, *Ecclesiastical Law*, 2nd ed., vol. ii. p. 1355]. See FIRST-FRUIT, QUEEN ANNE'S BOUNTY.

Annexation is used in international law to denote the adding to its dominions by a State of territory until then not belonging to it. The term is of comparatively modern use, and generalises the modes of territorial acquisition known as CONQUEST (*q.v.*), OCCUPATION (*q.v.*). See, under TREATIES, cessions of territory; and under NATIONALITY, the status of inhabitants in connection with cessions of territory.

For annexation under Scots law, see article thereon in Green's *Encyclopædia of Scots Law*.

Annual Rent.—"Annual rent is not annual profit or value" (*per* Bayley, J., *R. v. Tomlinson*, 1829, 9 Barn. & Cress. 167). The expression "net yearly rent" used in that case was held to be equivalent to the rent paid by the tenant after deducting taxes and charges of collection, and *not* the "clear annual rent" after every deduction, including therefore the part to be set aside for repairs and reproduction of the subject of the "rate"; and see *Smith v. Corporation of Birmingham*, 1883, 11 Q. B. D. 195, where the meaning of the term is discussed.

Annual Value.—The words "annual value of the land" are not words of art, but mean, in common parlance, a rack-rent, or the value of the gross produce of the land, minus all payments, expenses, interest, labours, and charges on the land, or on the tenant (*per* Watson, B. *In re Elwes*, 1859, 28 L. J. Ex. 47).

Value means "net value" (*per* Ld. Bramwell, *Dobbs v. Grand Junction Waterworks Co.*, 1884, 53 L. J. Q. B. 52).

See exhaustive discussion of various meanings in Stroud, *in loc.*

Annuities, as distinct from rent-charges, are dealt with in this article.

An annuity is either a personal liability, or may be given out of personal assets only; or out of real and personal assets.

A rent-charge issues out of the land, and is generally created by a limitation to uses.

1. *Characteristics of Annuities.*—An annuity, if given with words of limitation appropriate to real estate, is a personal hereditament, and will devolve like real estate. But such an annuity is not within the Statute *de donis* and cannot be entailed. If it is given to a person and the heirs of his body the donee takes a fee-simple, conditional upon the birth of issue (*Earl of Strafford v. Buckley*, 1750, 2 Ves. 170; *Turner v. Turner*, 1783, Amb. 776; *Holderness v. Carmarthen*, 1784, 1 Bro. C. C. 377). And for all purposes except descent, such an annuity is personal estate (*Earl of Strafford v. Buckley*, 1750, 2 Ves. 170; *Aubin v. Daly*, 1820, 4 Barn. & Ald. 59; 22 R. R. 623; *Radburn v. Jarvis*, 1841, 3 Beav. 450).

An annuity charged on real and personal property, if given without words of limitation applicable to realty is personal estate, and devolves as such (*Taylor v. Martindale*, 1841, 12 Sim. 158; *Parsons v. Parsons*, 1869, L. R. 8 Eq. 260; *Joynt v. Richards*, 1882, 11 L. R. Ir. 278).

By 18 & 19 Vict. c. 15, ss. 12, 13, an annuity, not created by marriage settlement or will, will not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors taking without notice, unless a memorandum as to the annuity is registered at the central office (*Greaves v. Tofield*, 1880, 14 Ch. D. 563).

An annuity may be given for life with remainders, and may be limited in the same way as other property. A mere direction that it is not to be alienated, or not to be subject to the Bankruptcy Law, is invalid, but it may be given over and directed to cease upon any event, and a direction for cesser is effectual without a gift over (*Dommett v. Bedford*, 1796, 6 T. R. 684; *Brandon v. Robinson*, 1811, 18 Ves. 429, 11 R. R. 226; *Rochford v. Hackman*, 1852, 9 Hare, 475; *Joel v. Mills*, 1857, 3 Kay & J. 458; *Hurst v. Hurst*, 1882, 21 Ch. D. 278).

2. *Right of Annuitant to value of Annuity.*—If a sum is given by will to buy an annuity, or a Government annuity of a fixed amount is to be bought, the annuitant is entitled to have the purchase-money paid over to him, whether the annuity is in possession or reversion. If the annuitant dies before the time when the annuity is to be purchased, his legal personal representatives are, nevertheless, entitled to the purchase-money (*Barnes v. Rowley*, 1797, 3 Ves. 305; *Bailey v. Bishop*, 1803, 9 Ves. 6; *Palmer v. Crawford*, 1819, 3 Swans. 482; *Dawson v. Harn*, 1830, 1 Ry. & M. 606).

An intention expressed that the annuity is to be for the personal enjoyment of the annuitant will not alter the case; for instance, a discretion conferred on trustees to apply the annuity for the annuitant's benefit, if incapacitated, or a direction that he is not to have the value of the annuity, or that the annuitant, not being a married woman, is to have no power of anticipation (*In re Browne's Will*, 1859, 27 Beav. 324; *Stokes v. Cheek*, 1860, 28 Beav. 620; *Woodmeston v. Walker*, 1831, 2 Ry. & M. 197).

There is some conflict of cases as to the effect of a direction that the annuity to be purchased is to go over or cease upon alienation, bankruptcy, or similar events.

If the annuity is to be purchased from Government, in the name of the annuitant, such a direction may be rejected as inconsistent with the gift, and the annuitant may take the money (*Hunt Foulston v. Furber*, 1876, 3 Ch. D. 285).

If the annuity is to be purchased by the trustees, it is unsettled whether such a direction is effective or not, so as to prevent the annuitant or his legal personal representatives from claiming the purchase-money. A

distinction has also been drawn between a direction that the annuity is to cease on alienation and a gift over on that event (see *Day v. Day*, 1853, 1 Drew. 569, on the one hand, and *Power v. Hayne*, 1869, L. R. 8 Eq. 262; *Hatton v. May*, 1876, 3 Ch. D. 148, on the other; also *In re Mabbett*, *Pitman v. Holborrow* [1891], 1 Ch. 787).

In some cases where an estate is being administered by the Court, and proves to be insufficient to pay annuities and legacies in full, a value is put upon the annuity, and the value, after abatement, is paid to the annuitant or his legal personal representatives (*Wroughton v. Colquhoun*, 1847, 1 De G. & S. 357; *Carr v. Ingleby*, *ibid.*, 362; *Long v. Hughes*, *ibid.*, 364). For the purposes of abatement the value must be ascertained by adding instalments already accrued, due to the present value of future instalments (*Heath v. Nugent*, 1860, 29 Beav. 226; *In re Wilkins*, *Wilkins v. Rotherham*, 1884, 27 Ch. D. 703).

3. *Duration of Annuities*.—An annuity given by will to a person, without any words defining its duration, whether the annuity be given immediately or after a life interest, is an annuity for the life of the annuitant only (*Blewitt v. Roberts*, 1841, Cr. & Ph. 274; *Blight v. Hartnoll*, 1881, 19 Ch. D. 294).

The fact that the annuity is stated to be for maintenance and education will not, as a general rule, cut it down to an annuity only until the annuitant comes of age (*Wilkins v. Jodrell*, 1879, 13 Ch. D. 564).

The rule that an annuity given without words defining its duration is for life only, yields to expression of a contrary intention.

A contrary intention is not to be inferred from the fact that the annuity is charged on a fund, or charged on rents, profits, or income, which on the face of the will appear to be insufficient to do more than pay the annuity (*Going v. Hanlon*, 1869, 1 R. 4 C. L. 144; *Whitten v. Hanlon*, 1885, 16 L. R. Ir. 298; *In re Forster's Estate*, 1889, 23 L. R. Ir. 269; *In re Morgan*, *Morgan v. Morgan* [1893], 3 Ch. 222).

But it may be inferred if the annuity is given in such a way as to be, in effect, the gift of the income of a fund without limit of time, or if power is given to the annuitant to appoint the annuity in perpetuity, or if the annuity is given over in a manner inconsistent with its being a life annuity only (*Stokes v. Heron*, 1845, 12 Cl. & Fin. 161; *Hedges v. Harpur*, 1858, 3 De G. & J. 129; *Mansergh v. Campbell*, 1858, 3 De G. & J. 232; *Warren v. Wright*, 1861, 12 Ir. Ch. 401; *Barden v. Meagher*, 1867, 1 R. 1 Eq. 246).

An annuity given for a particular period is not cut down to the life of the annuitant, because it is stated to be for maintenance (*Attwood v. Alford*, 1866, L. R. 2 Eq. 479).

An annuity to a trustee for his trouble ceases when the active trusts cease, though it is not necessarily put an end to by a judgment for administration (*Hull v. Christian*, 1874, L. R. 17 Eq. 546; *McDermott v. O'Connor*, 1876, 1 R. 10 Eq. 352).

If the duration of an annuity is defined by express words, it lasts during the period defined; and if the donee dies during the period, it passes to his legal personal representatives. Thus an annuity given to A. during B.'s life, goes to A.'s legal personal representatives if he dies before B. (*Lavery v. Dyer*, 1752, Amb. 139; *In re Ord.*, *Dickinson v. Dickinson*, 1879, 12 Ch. D. 22).

4. *Survivorship between Annuitants*.—An annuity to A. and B. for their lives goes to them during their joint lives, and to the survivor during his life (*Brudnel's case*, 1592, 5 Co. 9; *Day v. Day*, 1854, Kay, 703; *Moffatt v.*

Burnie, 1853, 18 Beav. 211; *Neighbour v. Thurlow*, 1860, 28 Beav. 33; *Alder v. Lawless*, 1863, 32 Beav. 72).

An annuity during the lives of A. and B., to be equally divided between them, does not go to the survivor. It may be an annuity during the joint lives only, or a gift of half the annuity to each annuitant for his life (*Grant v. Winbolt*, 1854, 2 W. R. 151; *In re Drakeley's Estate*, 1854, 18 Beav. 395).

If an annuity is given to two persons as tenants in common during their lives, and the life of the survivor, each takes an annuity during the period defined, and upon the death of one of them his annuity is payable to his legal personal representatives during the other's life (*Eales v. Cardigan*, 1838, 9 Sim. 384; *Jones v. Randall*, 1819, 1 Jac. & W. 100; 20 R. R. 237; *Bryan v. Twigg*, 1867, 3 Ch. 183).

In such cases there may be words sufficient to carry the whole annuity to the survivor (*Doe v. Abey*, 1813, 1 M. & S. 428, 14 R. R. 487; *Hilton v. Finch*, 1841, Beav. 186; *Cranswick v. Pearson*, 1862, 31 Beav. 624, 9 L. T. 275).

And if an annuity is given to several as tenants in common during their lives, and is then given over entire after the death of the survivor, the survivor for the time being takes the whole (*Armstrong v. Eldridge*, 1791, 2 Bro. C. C. 215; *McDermott v. Wallace*, 1842, 5 Beav. 142; *Begley v. Cook*, 1856, 3 Drew. 662; *Alt. v. Gregory*, 1856, 8 De G., M. & G. 221; *Draycott v. Wood*, 1863, 8 L. T. 304).

5. *Charge upon Corpus or Income*.—An annuity may be a charge upon income only, or both upon income and capital. The cases upon this subject are very numerous, and they depend upon nice points of construction. It is proposed here only to state the principal distinctions which have been drawn.

Where an annuity is given and there is then a gift of residue, the annuity is a charge upon *corpus*, and the fact that there are directions to set aside a fund to pay the annuity does not alter the case (*Carmichael v. Gee*, 1880, 5 App. Cas. 588).

On the other hand, if the only direction is to set aside a fund to pay an annuity, and the fund is given over at the death of the annuitant, it is a case of tenant for life and remainder-man of a fund, and the annuity is not charged upon *corpus* (*Baker v. Baker*, 1858, 6 H. L. 616).

If the only gift is to be found in a direction to pay the annuity out of the rents and profits of particular property, or out of the income of a residue, the annuity is a charge on the *corpus*, if the property or residue is given, subject to or after payment of the annuity (*Birch v. Sherratt*, 1867, L. R. 5 Ch. 644; *In re Mason*, *Mason v. Robinson*, 1878, 8 Ch. D. 411; *Bell v. Bell*, 1872, Ir. R. 6 Eq. 239; *In re Moore's Estate*, 1887, 19 L. R. Ir. 365).

But when the only gift is out of income, if the *corpus* must be taken to have been intended to remain, or is treated as intact at the annuitant's death, the annuity is only a charge upon income (*Foster v. Smith*, 1845, 1 Ph. Ch. 629; *Taylor v. Taylor*, 1874, 17 Eq. 324).

As a general rule, where a life annuity is payable out of income, arrears of one year are payable out of future income accruing during the annuitant's life, unless there is something to show that each year's annuity must be paid only out of the income of that year; and the annuity may be so expressed as to make arrears payable out of income accruing after the annuitant's death (*Stelfox v. Sugden*, 1859, John. 234; *Booth v. Coulton*, 1870, L. R. 5 Ch. 684; *Taylor v. Taylor*, 1874, L. R. 17 Eq. 324; *Wormald v. Maseen*, 1881, 17 Ch. D. 167).

6. *Remedies of Annuitants*.—An annuitant whose annuity is a charge

upon the residue of an estate is not entitled to have the residue realised and invested to secure the annuity, if it can be otherwise sufficiently secured (*In re Potter, Potter v. Potter*, 1884, 50 L. T. 8; *In re Parry, Scott v. Leak*, 1889, 42 Ch. D. 570).

An annuitant, whose annuity is charged upon a residue, is entitled to have a sufficient fund set aside to pay the annuity, but when this has been done he cannot delay the distribution of the rest of the estate (*Harbin v. Masterman* [1896], 1 Ch. 351).

7. *Annuities as affected by the Statutes of Limitation.*—If the annuity is only secured by the personal liability of the grantor, the Statutes of Limitation, 21 Jac. I. c. 16, 9 Geo. IV. c. 14, 3 & 4 Will. IV. c. 42, begin to run against each instalment as it accrues (*Arnott v. Holden*, 1852, 18 Q. B. 593; *Edwards v. Warden*, 1874, L. R. 9 Ch. 495, 1 App. Cas. 281).

An annuity charged on land is within sec. 42 of the Real Property Limitation Act, 1833, 3 & 4 Will. IV. c. 27, so that only six years' arrears can be recovered, and non-payment for twelve years bars the annuity altogether (*James v. Salter*, 1837, 3 Bing. N. C. 544; *Francis v. Grover*, 1845, 5 Hare, 39; *Irish Land Commission v. Grant*, 1884, 10 App. Cas. 14).

Having regard to sec. 10 of the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, it would seem to make no difference that the annuity is secured by an express trust (see, however, *Hughes v. Coles*, 1884, 27 Ch. D. 231).

An annuity charged on personalty only is not within sec. 42 of the Act of 1833, but it is a legacy within sec. 40 of that Act and sec. 8 of the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57 (*Roch v. Callen*, 1847, 6 Hare, 531; *Ashwell's Will*, 1859, John. 112).

An annuity charged on real and personal estate is within sec. 42 of the Act of 1833, and is barred by non-payment for twelve years (*Dower v. Dower*, 1885, 15 L. R. Ir. 264; *In re Nugent's Trusts*, 1885, 19 L. R. Ir. 140).

8. *Miscellaneous.*—An annuity given by a will is included in the term legacies, used in the will, unless there is evidence of a contrary intention (*Heath v. Weston*, 1853, 3 De G., M. & G. 601; *Gaskin v. Rogers*, 1866, L. R. 2 Eq. 284).

And annuities are payable in the same order of priority as legacies, unless there is something in the will to give them priority (*Miller v. Huddleston*, 1851, 3 Mac. & G. 513).

A gift by will of a clear annuity means an annuity free from legacy duty, but a direction to invest a sum sufficient to produce a clear annual sum, and pay the income of the fund to the legatee, is not free from duty, as the word "clear" in that case may be referred to the costs of investment (*Haynes v. Haynes*, 1853, 3 De G., M. & G. 590; *Pridie v. Field*, 1854, 19 Beav. 497).

A gift by will of an annuity, free from deductions, does not entitle the annuitant to have the income-tax paid at the expense of the estate, unless there is something to show that the testator includes income-tax in the word deductions (*Gleadow v. Leatham*, 1882, 22 Ch. D. 269; *In re Buckle, Williams v. Marson* [1894], 1 Ch. 286).

An annuity given by will commences from the testator's death, and, if payable quarterly or half-yearly, the first payment is due at the end of the first quarter or half-year from the death (*Houghton v. Franklin*, 1823, 1 Sim. & St. 390, 24 R. R. 201).

Arrears of an annuity do not as a general rule carry interest (*Torre v. Browne*, 1855, 5 H. L. 555; *Edwards v. Warden*, 1876, 1 App. Cas. 281).

See further, ABATEMENT OF ANNUITIES.

Annulment of Bankruptcy.—See BANKRUPTCY.

Annulment of Composition.—See BANKRUPTCY.

Answer.—This was the name for the defendant's pleading in reply to the facts alleged in the bill filed by a plaintiff in a Chancery suit, under the old system before the Judicature Act. It differed from pleas at common law chiefly in two particulars: (1) That the defendant in his answer went minutely into the details of his evidence instead of relying on general denials; (2) That he swore to the truth of its contents. Its place is now taken by a defence. In divorce proceedings, the reply of the respondent to the petition is still called an answer. See CAMPBELL'S (LORD) ACT (libel).

Ante litem motam.—Before litigation commenced.

Antecedent Debt.—An expression used in different branches of law, as equivalent to a past or pre-existing debt, especially in connection with the subject of consideration. An admission of an antecedent debt, or a promise to pay it, by the debtor, may be relied on either as an account stated, or as merely evidence of the original cause of action. As to the distinction in pleading, see R. S. C., Order 20, r. 8. A promise by A. to pay a debt due by B. is not binding unless there be some new consideration, such as a giving of credit or forbearance to press for payment, or unless credit was originally given to B. at A.'s request (*Johnston v. Nicholls*, 1845, 1 C. B. 251). But if a guarantee for the repayment of an advance is ambiguous, parol evidence may be given to show that the advance was not a past one, but was made simultaneously with the execution of the guarantee (*Haigh v. Brooks*, 1840, 10 Ad. & E. 309; *Goldshede v. Swan*, 1847, 1 Ex. Rep. 154), or that the guarantee was intended to be a continuing security for the balance of a current account (see *In re Boys*, 1870, L. R. 10 Eq. 467). When a mercantile agent pledges his principal's goods for an "antecedent debt," the title of the principal is not affected; by sec. 4 of the Factors Act, 1889, the pledgee acquires "no further right to the goods than could have been enforced by the pledgor at the time of the pledge." The lien of a factor upon goods intrusted to him for sale by his principal does not extend to a debt incurred before his employment as factor (*Houghton v. Matthews*, 1803, 3 Bos. & Pul. 485, 7 R. R. 815). An assignment of the whole of a debtor's property in consideration of a past debt, there being no substantial present equivalent for the assignment, and no *bond fide* agreement to make further advances, is necessarily an act of bankruptcy (*In re Wood*, 1872, L. R. 7 Ch. 302). On the other hand, an antecedent debt is a good consideration within the meaning of the Statute 13 Eliz. c. 5; so that, in order to set aside the transaction under the Statute, it is necessary to show that it was not *bond fide*. If the assignment deals only with a part of the debtor's property, it may be void as a fraudulent preference. As to the distinction between an antecedent debt and an antecedent liability which has not yet ripened into a debt, see *Kaltenbach v. Lewis*, 1885, 10 App. Cas. 617; *Mayer v. Mindlevich*, 1888, 59 L. T. 400; *Richardson v. Harris*, 1889, 22 Q. B. D. 268.

Antenatus denotes a child born before the marriage of its parents. Legitimation *per subsequens matrimonium* was first ordained by a constitution of Constantine as to existing children, and the civil law ultimately allowed legitimation in all cases if the parents had lived in concubinage. The canon law recognises all *antenati* to be as legitimate to inherit as children born after marriage (Burge, *Foreign and Colonial Law*, vol. i. 92. See p. 101, *ibid.*, for the laws prevailing in different countries).

Foreign jurists generally agree that as the validity of a marriage depends on the law where it is celebrated, the same law ought to govern the legitimacy of the offspring; so that if, in the country of marriage,—at all events, if the parents were domiciled there,—*antenati* would be legitimated, they ought to be legitimated in all countries for all purposes, including heirship of real estate (Story, *Conflict of Laws*, 8th ed., p. 118).

Subsequent marriage in England does not remove illegitimacy, though it does in Scotland, where *antenati* inherit as heirs.

English law was settled as to heirship since the Statute of Merton, c. 9, when the Earls and Barons resolved that they would not change the law of England that an *antenatus* could not inherit land. It was so decided in *Doe v. Vardill*, 1840, 2 Cl. & Fin. 571; 7 Cl. & Fin. 895. Nor can a father inherit from his *antenatus* son (*Don's Estate*, 1857, 4 Drew. 196). This rule does not apply to devises by will, under which *antenati* can take (*Grey v. Stamford* [1892], 3 Ch. 88).

An *antenatus* cannot be legitimated *per subsequens matrimonium* unless the father was domiciled in a country whose laws allowed such legitimation both at the time of birth and of marriage (*Vaucher v. Solicitor of the Treasury*, 1887–88, 40 Ch. D. 216; *Wright's Trusts*, 1856, 2 Kay & J. 595).

It was assumed in *Doe v. Vardill* that an *antenatus*, legitimated by the law of his country, could succeed to personal estate; and it was decided in *Andros v. Andros*, 1883, 24 Ch. D. 637, that an *antenatus* was entitled to share in personalty left by will. In *Skottowe v. Young*, 1871, L. R. 11 Eq. 474, an *antenatus* was held only liable to one per cent. legacy duty on the proceeds of sale of English land devised on trust to sell.

An *antenatus* can participate under the Statute of Distributions (*Goodman's Trusts*, 1881, 17 Ch. D. 266, overruling some previous cases).

See BASTARD; LEGITIMACY.

Anticipation, Restraint on.—See HUSBAND AND WIFE; RESTRAINT ON ANTICIPATION.

Anticor.—See WARRANTY.

Any.—“Any” is a word which excludes limitation or qualification (*per Fry, L. J., Duck v. Bates*, 1884, 12 Q. B. D. 79; and see *Beckett v. Sutton*, 1882, 51 L. J. Ch. 433). But its generality may be restricted by the subject-matter or the context (*Ex parte Bagster*, 1883, 24 Ch. D. 477).

The various meanings of which “any” is capable in different circumstances are exhaustively set out in Stroud.

Apartments.—An agreement to let or take apartments in a house, which, if executed by entry, would amount to a demise, is a contract

of an interest in lands, within s. 4 of the Statute of Frauds, and must be in writing (*Inman v. Stamp*, 1815, 1 Stark. 12, 18 R. R. 740; *Edge v. Strafford*, 1831, 1 Crompt. & J. 391); not so an agreement for board and lodging where no specific rooms are demised to the lodger (*Wright v. Stavert*, 1860, 2 E. & E. 721; 29 L. J. Q. B. 161). A person who has agreed to take apartments, but who has never entered, is not liable for use and occupation, but may be sued for damages for breach of his agreement to become tenant (*Edge v. Strafford*, *supra*; *Lowe v. Ross*, 1850, 5 Ex. 553, 19 L. J. Ex. 318; *Towne v. D'Heinrich*, 1853, 13 C. B. 892, 22 L. J. C. P. 219).

As to stamp duty, see s. 78 of the Stamp Act, 1891.

If the tenant has entered into occupation, he may maintain a possessory action for a disturbance of his possession and enjoyment of the premises (*Wright v. Stavert*, *supra*)—a remedy which is not open to a mere lodger (see *Monks v. Dykes*, 1839, 4 Mee. & W. 567). In the absence of an agreement to the contrary, the tenant has also an incidental right to the use of everything necessary to his enjoyment of the premises, such as the door-bell and knocker, the skylight of the staircase, and the water-closet (*Underwood v. Burrows*, 1835, 7 C. & P. 26). The landlord is under no implied obligation to take care of the goods of his tenant (*Holder v. Soulby*, 1860, 8 C. B. N. S. 254, 29 L. J. C. P. 246), though he will be liable for loss caused by his gross negligence or misconduct (*Clench v. d'Arenberg*, 1883, C. & E. 42).

The rent of furnished apartments is deemed to issue entirely out of the realty, and may therefore be distrained for (*Newman v. Anderton*, 1806, 2 Bos. & P. N. R. 224). See DISTRESS.

In letting furnished apartments for immediate occupation, the landlord impliedly undertakes, in the absence of express stipulation, that they are in a habitable state (*Wilson v. Finch-Hatton*, 1877, 2 Ex. D. 336, 46 L. J. Ex. 489; approving the decision in *Smith v. Marrable*, 1843, 11 Mee. & W. 5; see also *Campbell v. Lord Wenlock*, 1866, 4 F. & F. 716). This implied obligation is not merely a warranty for breach of which the landlord is liable in damages; it is a condition, upon breach of which the tenant may at once rescind the contract and refuse to occupy the premises or pay the rent. The condition is broken if the rooms are so infested by vermin (*Smith v. Marrable*, *supra*), or so insanitary, by reason of defective drainage (*Wilson v. Finch-Hatton*, *supra*), or of the presence of contagious illness (*Bird v. Greville*, 1884, C. & E. 317), as not to be reasonably fit for habitation. But the implied obligation relates only to the time fixed for the commencement of the tenancy; there is no implied warranty that the apartments shall remain in a sanitary condition during the tenancy, even if the landlord resides in the house and supplies attendance and service (*Sarson v. Roberts* [1895], 2 Q. B. 395).

Furnished apartments being ordinarily let for short periods, a tenancy from year to year is not readily inferred (see *Wilson v. Abbott*, 1824, 3 Barn. & Cress. 88); but, except in this respect, the law relating to the duration of the tenancy and the requisite notice to quit does not differ from the law applicable to tenancies generally. See LANDLORD AND TENANT; LODGER; NOTICE TO QUIT.

Apology.—By sec. 2 of Lord Campbell's Act (6 & 7 Vict. c. 96), it is a defence to an action for a libel contained in any public newspaper, or other periodical publication, for the defendant to plead and prove that the libel was inserted "without actual malice, and without gross negligence, and

that, before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel." The defendant must pay money into Court with any plea under this section, or it will be treated as a nullity (8 & 9 Vict. c. 75, s. 2). Hence no other defence denying liability can now be joined with such a plea (Order 22, r. 1). But the fact that such a payment has been made must not be mentioned to the jury (Order 22, r. 22).

Again, by s. 1 of the same Act, the defendant in any action for defamation may "give in evidence, *in mitigation of damages*, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology." The defendant must give notice to the plaintiff of his intention to tender such evidence at the time when he delivers his defence.

And wholly apart from these sections, a defendant is always allowed to give evidence of any apology or other amends in mitigation of damages, even though such apology was not made "at the earliest opportunity after the commencement of the action" (*Smith v. Harrison*, 1856, 1 F. & F. 565). Sometimes the defendant apologises for the first time in his defence, though such pleading is not strictly permissible. But a tardy or reluctant apology will not help a defendant much, especially if the plaintiff demanded an apology before action without success.

A retraction should be made as publicly as the charge, and as far as possible to the same persons. In the case of a slander, heard only by few, the plaintiff should be content with a letter of apology addressed to himself, fully retracting the charge, which can be shown to everyone who heard the defendant's words. But if the charge was made publicly in a newspaper, the apology also should be made publicly, and in the same newspaper. It should be printed in type of ordinary size, and in a part of the paper where it will be seen; not hidden away among the advertisements or notices to correspondents (*Lafone v. Smith*, 1858, 3 H. & N. 735). The defendant should also do all in his power to stop any further circulation of the libel.

An apology should always be frank and full. If made promptly it will often put an end to the action. But a guarded half-hearted apology will be of no avail. The defendant must not try to exculpate himself or justify his conduct. It is no use to publish a paragraph expressing astonishment at the receipt of a lawyer's letter, and attempting to explain away or minimise an imputation clearly made. It is still worse to assert, as is sometimes done, that the defendant has done the plaintiff a kindness in making a false charge against him, as it "has afforded him an opportunity of publicly denying it!" A mere correction is not an apology. A statement cannot be called an apology, unless it both unreservedly withdraws all imputation, and expresses regret for having made it. The sufficiency or insufficiency of an apology is peculiarly a question for the jury. Though it should be full, it need not be abject; the defendant is not bound to insert an apology dictated by the plaintiff; but it must be such as an impartial person would consider reasonably satisfactory under all the circumstances of the case (*Risk Allah Bey v. Johnstone*, 1868, 18 L. T. 620).

Apostasy.—Apostasy (*apostasia*, (ἀποστασία)) denotes generally the abandonment of principles previously held, but specially the renunciation of belief in Christianity. According to Bracton (temp. Hen. II.), such re-

nunciation was in his time punished by death by burning. Later, apostates seem to have been punished only by the spiritual Courts; but by Statute 9 & 10 Will. III. c. 32 (1698), all persons educated in, or having at any time made profession of, the Christian religion, who should deny the Godhead of the Persons of the Holy Trinity, or assert that there are more Gods than one, or deny the truth of Christianity or the divine authority of the Scriptures, were rendered liable, for the first offence, to disability for all offices, and for the second, to disability to plead in any Court and to imprisonment for three years. This statute was repealed by 53 Geo. III. c. 160, s. 2 (1813), so far as related to denials regarding the Holy Trinity. Before the Reformation, if a monk broke forth from his convent, a writ *de apostata capiendo* was directed to the Sheriff for his apprehension. See BLASPHEMY; CHRISTIANITY.

Apothecary.—An apothecary prescribes, prepares and sells drugs, and also prepares and sells drugs prescribed by others (*Rose v. College of Physicians*, 1703, 5 Bro. P. C. 553; *Woodward v. Ball*, 1834, 6 Car. & P. 577). A qualified practitioner under the Medical Acts, who is not an apothecary, may only supply drugs "in respect of his practice" (Medical Act, 1886, s. 6; see *Leman v. Fletcher*, 1873, L. R. 8 Q. B. 319). A chemist may only supply drugs, he may not prescribe them (see CHEMIST; and *Apothecaries Company v. Greenough*, 1841, 1 Q. B. 799). The licence of the Society of Apothecaries, London, was, before the Medical Act, 1886, one of the lower qualifications for registration under the Medical Acts (Medical Act, 1858, s. 15), but for such registration, after the first of June 1887, the qualifying examination in medicine, surgery, and midwifery prescribed by the Medical Act, 1886 (see ss. 2 and 3) must be passed. The Society of Apothecaries, London, was incorporated by royal charter (15 James I.). Its privileges and duties are now regulated by the Apothecaries Act, 1815, and the Amendment Act, 1874. The Act of 1815 makes provision for the examination of and granting certificates to apothecaries and their assistants, imposes penalties on persons practising as apothecaries, or assistant-apothecaries, without being certificated (ss. 14, 17 and 20), and forbids any apothecary to recover any charges in a court of law, unless he prove that he had obtained a certificate (s. 21) at the time when he rendered the services, or supplied the drugs, for which the charges are claimed (*Leman v. Houseley*, 1874, L. R. 10 Q. B. 66). The prohibition of the Act is still in force (*Davies v. Makana*, 1885, 29 Ch. D. 596), except that by the Medical Act, 1886, s. 6, any medical practitioner, registered under the Medical Acts, is entitled to practise medicine, and recover in respect of such practice any charge in respect of medicaments, and any fees. An apothecary, who is himself duly licensed, cannot recover charges for medicines supplied by an unqualified assistant without consulting him (*Howarth v. Brearley*, 1887, 19 Q. B. D. 303). Only one penalty is recoverable from a licensed person for practising contrary to the Act, although he gives advice to several patients (*Apothecaries Company v. Jones* [1893], 1 Q. B. 89).

The Amendment Act of 1874 repealed the provisions of the Act of 1815, which made the service of an apprenticeship necessary, and empowered the Society to strike off the list of its licentiates persons convicted of crime, or guilty of "infamous conduct in any professional respect." See INFAMOUS CONDUCT.

Registered apothecaries are exempt from service on juries or inquests

(Jury Act, 1870, s. 9, and sched.), or in parish offices or in the militia (Medical Act, 1858, s. 35).

A certificate of the qualification of an apothecary, purporting to be under the seal of the Society, is receivable in evidence without further proof (Lord Brougham's Act, 14 & 15 Vict. c. 99, s. 8; see also CHEMIST; MEDICAL PRACTITIONER; MEDICINE).

Apparent (and Continuous) Easements.—Apparent easements are those which are manifested by some apparent sign, as the easement of light which is manifested by a window, or a watercourse by the fact of a flowing stream; while non-apparent easements are such rights as support, or a right of way, if there is no track or mark from which its existence can be inferred. Continuous easements are those which are in continual exercise, though they may not be incessantly used, as support and light, while such a right as a right of way, which is only used from time to time, is not continuous.

The doctrine of implied grants, arising on division of property between two or more persons, has given rise to much litigation as to apparent and continuous easements; it being questioned whether an apparent and continuous mode of use of one part of a property, for the beneficial enjoyment of another part by the owner of both, becomes an easement appurtenant to the latter, if the owner divides them by sale or otherwise, and makes no express stipulations on the subject. The case in which the question was first raised was *Pyer v. Carter*, 1857, 1 H. & N. 916, relating to a drain which ran from one house under another, both houses having been one formerly, but having been converted into two and sold to different people. This was followed by a series of cases relating to easements of various kinds, in which different opinions prevailed, and considerable doubt arose as to what easements were to be regarded as apparent and continuous and what were not. [See Goddard on *Easements*, 5th ed., p. 174.]

Apparent Heir.—See HEIR.

Apparent Partners.—See PARTNERSHIP.

Apparent Possession.—See BILLS OF SALE.

Apparitor.—The word is now used to describe the officer of an Ecclesiastical Court. His duty is "to convene and cite defendants into Court, to introduce the process emitted by the judge, and to admonish or cite the parties in the production of witnesses and the like." In this capacity he serves all processes issuing out of an Ecclesiastical Court, and summons offenders and others to make their appearance therein. An apparitor is chosen by the ecclesiastical judge, and may be suspended by him; but may not be removed at discretion when he holds his office by patent. An apparitor holds his office at the pleasure of Parliament, and does not possess a vested interest in it (10 & 11 Vict. c. 98; 38 & 39 Vict. c. 76, s. 2). Canon 135 of the Canons of 1603 provides that an apparitor shall not exact more fees than in "those our constitutions formerly prescribed";

that is, such fees as were certified in 1597. Canon 138 limits the number of apparitors in any Court. If an apparitor's fees are withheld, he can recover them by an action at law, but not in an Ecclesiastical Court.

In addition to ecclesiastical penalties, an apparitor is liable to an action in a temporal court for any act of falsehood in the execution of his office.

An apparitor is occasionally described as a summoner or sumner (21 Hen. VIII. c. 5, canon 138, *supra*); also as a beadle. Apparitors are so called "quia faciunt reos apparere in conspectu judicium."

[*Authorities*.—Ayliffe, *Parergon Juris Canonici*, pp. 67–71; Phillimore, *Ecclesiastical Law*, 2nd ed., vol. ii. pp. 951–954.]

Appeal of Felony was a criminal accusation of felony made by a private accuser, as distinguished from such accusation made by indictment of a grand jury or coroner's inquisition. It was a survival of the primitive customs of private war, and was in certain events tried by battle. Appeals in cases not capital were early superseded by actions of tort; appeals of larceny fell out of use in consequence of the provisions of 21 Hen. VIII. c. 11 (now embodied in 24 & 25 Vict. c. 96, s. 100, and 56 & 57 Vict. c. 71, s. 24), as to the restitution to the true owner of the stolen property, on conviction of the offender at the suit of the Crown (see *Bentley v. Vilmont*, 1886, 12 App. Cas. 471). The last appeal was *Ashford v. Thornton*, 1818, 1 Barn. & Ald. 405, 19 R. R. 349, in consequence of which appeals were abolished by 59 Geo. III. c. 46.

[The history of the subject may be traced in Pollock and Maitland, *Hist. Eng. Law*, ii. 464–5, 481; Hawk. P. C., bk. ii. c. 23; Stephen, *Hist. Crim. Law Eng.* i. 244–250; Neilson, *Trial by Combat*, 1890; Lea, *Superstition and Force* (2nd ed., 1878), part ii.; *Bigby v. Kennedys*, 1770, 5 Burr. 2643.]

Appeals.

I. TO THE HOUSE OF LORDS.

As to the origin of the appellate jurisdiction of the House of Lords, see Dennison and Scott, *Practice of the H. of L.*, p. xvii; Freeman, *Norman Conquest*, vol. v. p. 386.

The House of Lords exercised an appellate jurisdiction at least from 1278. The old procedure by petition, and writ of error will be found in Dennison and Scott, pp. xxxi.–xxxvii, and also an account of tryers and receivers, p. xxxiv. A special provision for providing a tribunal of the House of Lords, consisting of a prelate, two earls, and two barons, was enacted by 14 Edw. III. c. 5, 1340. After 1413 the Lords seem to have hardly exercised their jurisdiction till after the accession of James I. The Lords only began to exercise an equitable appellate jurisdiction in the time of Charles the First (Dennison and Scott, p. xxxvii).

In the year 1675, the House of Commons made great protests against the jurisdiction of the House of Lords, where members of the Commons were concerned, but the House of Lords declared "that it is the undoubted right of the Lords in judicature to receive and determine, in time of Parliament, appeals from inferior courts, though a member of either House be concerned therein, that there may be no failure of justice in the land, and from this right and the exercise thereof, the Lords will not depart" (*Journals, Lords*, vol. xii. p. 695).

There was subsequently a threatening resolution of the House of Commons, and a response by the Lords, so the king prorogued Parliament. After it reassembled in February 1677, the Lords resumed the hearing of appeals without objection from the Commons, and from that time their jurisdiction has remained undisputed. The principle of the jurisdiction was a delegation by the Crown of its final authority (Hale, *Lords Jurisdiction*, p. 190).

In 1876 the Appellate Jurisdiction Act, 1876, endorsed this principle by sec. 4, which enacts that every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in her Court of Parliament.

A discussion arose in 1693 as to whether the House of Lords had an original jurisdiction, but after a considerable controversy the matter was settled by consent, and the Lords ceased to exercise an original jurisdiction.

At the end of the last century the amount of judicial business greatly increased, and in 1812 an appeal committee was appointed to assist in getting rid of the arrears of cases. This committee has been appointed regularly ever since. A full description of this and the practice before it, will be found in Dennison and Scott, pp. 28, 29; see *Directions for Agents*, 20. Counsel are not heard before the committee.

From time to time measures were taken for improving the system of final appeals, which will be found fully stated in Dennison and Scott, p. lii., including the creation of life peerages.

In 1873, by the Judicature Act, 1873, the jurisdiction of the Lords to hear English appeals was abolished, but the question was reconsidered and the jurisdiction finally restored under the provisions of the Appellate Jurisdiction Act, 1876, coming into force on the 1st November 1876. This Act, as amended by the Appellate Jurisdiction Act, 1887, the Appeal (*Formd Pauperis*) Act, 1893, and the Statute Law Revision Act, 1894, now governs the practice in the House of Lords.

By sec. 3, in England, an appeal lies to the House of Lords from any order or judgment of Her Majesty's Court of Appeal.

DIVORCE AND LEGITIMACY APPEALS.—There was a difficulty in divorce cases (see Dennison and Scott, p. 175), but this was removed by the Judicature Act, 1881, s. 9, which provided that all appeals which, under 20 & 21 Vict. c. 85, s. 55, or under any other Act, might be brought to the "full Court" (the Court for divorce and matrimonial causes), should henceforth be brought to the Court of Appeal. The decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes, or to the declaration of legitimacy, should be final, except where the decision was upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, or for a declaration of legitimacy, or was upon a question of law on which the Court of Appeal gave leave to appeal; and save, as aforesaid, no appeal should lie to the House of Lords under the said Acts. Appeals are to be brought within one month after the decision of the Court of Appeal, if the House of Lords is sitting, or, if not, within fourteen days after the House of Lords next sits. An appeal in a matrimonial cause to the House of Lords lies only from the Court of Appeal (*Cleaver v. Cleaver*, 1884, 9 App. Cas. 631; see *Annual Practice*, 1897, p. 125).

BANKRUPTCY.—Under the Bankruptcy Act, 1883, s. 104 (c), an appeal lies from the Court of Appeal to the House of Lords only with the leave of the Court of Appeal. For defect by bankruptcy, see *Directions for Agents*, 39.

PAUPER APPEALS.—Under the Appeal (*Forma Pauperis*) Act, 1893, s. 1, where a petition is presented for leave to sue *in forma pauperis*, and the House, on the report of its appeal committee, determines that there is no *prima facie* case for an appeal, the House may refuse the prayer of the petition. For practice in pauper appeals, see *Annual Practice*, 1897, vol. i. p. 412; vol. ii. p. 401; direction as to pauper costs, *ibid.*, p. 415; *Directions for Agents*, 16 and 19; *Johnson v. Lindsay* [1892], App. Cas. 110.

CRIMINAL CAUSES.—In England matters of a criminal nature could only be brought before the House of Lords by writ of error. See ERROR, WRIT OF. A writ of error lies for every substantial defect appearing on the face of the record, for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment, provided such defect is not cured by verdict (Archbold, *Criminal Proceedings*, 21st ed., 217). The mode of bringing writs of error was regulated by numerous statutes (Dennison and Scott, p. 3). Writs of error lay from the Queen's Bench Division to the Court of Appeal, but not from the Court of Appeal to the House of Lords; but there is, under the Appellate Jurisdiction Act, 1876, s. 3, an appeal from any order or judgment of the Court of Appeal, which includes the judgment of the Court of Appeal on a writ of error. The appeal is subject to the provisions of the last-named Act and the standing orders of the House. By sec. 10, the consent of the Attorney-General, or other law officer of the Crown, must be obtained, in any case where proceedings in error on an appeal could not hitherto have been had in the House of Lords without the fiat or consent of such officer (see Dennison and Scott, pp. 3-6; *Annual Ch. Pr.*, 1897, p. 109). Sec. 25 of the Act gave a definition of error, which is now repealed by the Statute Law Revision Act, 1894.

Sec. 4.—Every appeal shall be brought, by way of petition, to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal.

Sec. 5.—An appeal can only be heard by not less than three of the following persons: the Lord Chancellor, the Lords of Appeal in Ordinary (see ss. 6 and 14), and peers of Parliament holding, or having held, high judicial offices.

Peers not specially qualified have voted (*Annual Practice*, p. 107). High judicial offices are defined by sec. 25, as "the office of Lord Chancellor, or of a paid judge of the Privy Council, or a judge of the superior courts of Great Britain and Ireland" (*Annual Practice*, p. 115).

Sec. 6 provides for the appointment of two Lords of Appeal in Ordinary, and their qualifications, their salary, and position (see the Appellate Jurisdiction Act, 1887, s. 2).

Sec. 7 provides for the pensions of Lords of Appeal.

Sec. 8 (altered by the Statute Law Revision Act, 1894) provides for the hearing of appeals during the prorogation of Parliament, and sittings now take place in November. Any Lord of Appeal, though not an ordinary Lord of Appeal, may take his seat and the oaths at any such sitting (Appellate Jurisdiction Act, 1887, s. 1).

Sec. 9.—The Queen may, under her sign-manual, authorise the hearing of appeals during the dissolution of Parliament.

Sec. 10.—The consent of a law officer is necessary, in any case where

proceedings in error, or on appeal, could not hitherto have been had in the House of Lords without the consent or fiat of such officer.

Sec. 11 (as amended by the Statute Law Revision Act, 1894).—An appeal shall not lie from any of the Courts from which an appeal is given by this Act, except in the manner provided by this Act, and subject to such conditions, security for costs, and time, and generally as to all matters of practice and procedure as may be imposed by orders of the House of Lords (see Practice and Standing Orders, *Annual Ch. Pr.*, 1897, vol. ii. part v.).

By Stg. Order 4, appeals are to be dismissed, if conditions are not complied with.

Sec. 14.—A third and fourth Lord of Appeal in Ordinary may be appointed, and vacancies in such cases may be filled up. Such Lords of Appeal shall be the same in all respects as a Lord of Appeal appointed under the power before given by this Act.

For practice, forms, directions to agents, and standing orders, see *Annual Practice*, 1897, vol. ii. part v., and Dennison and Scott.

Petition of Appeal.—Every appeal must be by petition, printed on parchment, and must, except in certain cases, be lodged within one year of the decree or order appealed from. Two clear days' notice of the intention to present the appeal, together with a correct copy, must be served on the respondents before presentation, and a certificate of such service entered on the appeal. Two counsel must certify the petition and its reasonableness.

Order of Service.—See *Directions for Agents*, 3; Stg. Order 3.

Security for Costs (*Directions for Agents*, 5, 15, 41, and 42; Stg. Order 4).—The solicitors of the respondents should appear and enter their names. Only solicitors appearing are entitled to notice of meeting of the appeal committee.

Incidental Petitions and forms of petitions, in certain cases, are provided for by *Directions for Agents*, 18 and 19 (see *Annual Practice*, 1897, pp. 395, 401, Appendix C).

Appeal Committee.—See *supra*.

Lodgment of Cases and Appendices.—Printed cases have to be lodged (see *Directions for Agents*, 21, 22; Stg. Order (1) (3)); to be signed by one counsel (Stg. Order 7; *Directions for Agents*, 26); respondents' cases (*Directions for Agents*, 30, 31); forty copies of each case and Appendix are required to be lodged (*Directions for Agents*, 29; "Forms of Printed Cases," *Directions for Agents*, 27, 28).

Joint Case.—In an appeal from a special case, it is optional to lodge a joint case (*Directions for Agents*, 22).

Appendix.—Appendices have to be lodged with the cases (*Directions for Agents*, 23, 24, and 29; Stg. Order 5). The appellant must furnish the respondent with a proof copy of the Appendix and ten printed copies (*Directions for Agents*, 24). The costs of the Appendix, and the form of Appendix, are regulated by *Directions for Agents*, 25, 27, and 28.

Exchange of Cases.—After lodgment, the respective cases are exchanged (*Directions for Agents*, 32).

Setting Down for Hearing.—A cause may be set down *ex parte* (*Directions for Agents*, 30). For general directions, see *Directions for Agents*, 33; Stg. Order 5 (1).

Cases under Compromise are, if no compromise is arrived at, placed at the bottom of the list (*Directions for Agents*, 34).

Hearing of the Appeal.—Agents are required to have originals of the documents printed (*Directions for Agents*, 35; *Annual Practice*, 1897, vol. ii. p. 395).

Abatement on Death (see *Directions for Agents*, 39; Stg. Order 8).—In the event of the death of a party to the appeal, notice must be given to the Clerk of the Parliaments by letter, and must state whether the appeal is, or is not, abated. Direction 39 explains when abatements occur. See also ABATEMENT.

Cross Appeals.—Stg. Order 6; Dennison and Scott, p. 91.

Expiry of Time during the Recess.—Stg. Order 7.

Costs.—Forms of bills of costs may be obtained at the office for the sale of printed papers (House of Lords, App. E.). As to taxation of costs, Stg. Order 10; *Directions for Agents*, 41; *Annual Practice*, vol. ii. p. 396–7. Dennison and Scott (*Practice of the House of Lords*) and the *Annual Practice* furnish between them a full account of proceedings on appeals to the House of Lords.

II. TO THE PRIVY COUNCIL.

As to appeals to the Privy Council from India and the colonies and dependencies abroad, see PRIVY COUNCIL. The remaining appellate jurisdiction of the Privy Council falls under two heads—(1) Appeals in ecclesiastical matters, and (2) Appeals from judgments and orders under the Naval Prize Act, 1864. Appeals of the former kind are either from the Court of the Archbishop of Canterbury, under 25 Hen. VIII. c. 19, and 2 & 3 Will. IV. c. 92, or from that and certain other Courts under various Acts of Parliament; in particular The Church Discipline Act, 1840, The Public Worship Regulation Act, 1874, and The Clergy Discipline Act, 1892. As to appeals from the Court of Arches at Canterbury, these lay originally to the HIGH COURT OF DELEGATES, but were transferred by 2 & 3 Will. IV. c. 92, to the sovereign in council; this jurisdiction of the Privy Council being referred in the following year, by 3 & 4 Will. IV. c. 41, to the Judicial Committee of the Privy Council formed under the last-mentioned Act. Special provision was made with regard to the constitution of the Judicial Committee for the hearing of ecclesiastical appeals by the Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59, sec. 14 of which enacted that the sovereign might, by order in council, issue rules for the attendance on the hearing of cases of this sort, as assessors, of such number of the archbishops and bishops of the Church of England as the rules might determine. And in November 1876, in accordance with that provision, rules were issued (L. R. 2 P. D. 384), by which the Archbishop of Canterbury, the Archbishop of York, and the Bishop of London became *ex officio* assessors of the Judicial Committee on the hearing of ecclesiastical cases, performing their duties in rotation for periods of one year each, while the other bishops of dioceses, within the provinces of Canterbury and York, were ordered to attend as assessors, four at a time, for one year in rotation, beginning with the four junior bishops and advancing to the senior bishop, who being reached, the rotation would again revert to the junior bishop. Accordingly, five ecclesiastical assessors may sit on the trial of ecclesiastical appeals, and by the rules three of these must be present, though this number may, without invalidating the proceedings, be, through death or illness, reduced to two during the progress of a case. All spiritual causes whatever that are competent to the Court of Arches (see ARCHES, COURT OF), whether affecting the sovereign or not, may be appealed to the Judicial Committee so constituted (*Gorham v. Bishop of Exeter*, 1850, 5 Ex. Rep. 630), and in this way even complaints regarding offences committed by bishops may come within the Committee's cognisance (*Ex parte Read and Others, In re Bishop of Lincoln*, 1888, 58 L. J. P. C. 32), but

where the matter is not one properly coming within the archbishop's jurisdiction, even though considered in his Court, as, for example, where the Privy Council is asked to review an appeal to the archbishop against the decision of a bishop in a matter in which the latter had exclusive jurisdiction, no appeal will lie (*Poole v. Bishop of London*, 1850, 14 Moo. P. C. 262). Subjects of appeal may consist either of grievances (*gravamina*), such as a refusal by the inferior court to hear certain witnesses or evidence, or of definitive, *i.e.* final, judgments or orders, such as parts of a decree (*Read v. Bishop of Lincoln* [1892], App. Cas. 644), or of interlocutory decrees having the force of definitive judgments, such as an exception or plea in bar at the outset of a cause which prevents it going further (*Boyer v. Bishop of Norwich* [1892], App. Cas. 417). As a rule, doctrines will not be reviewed, but occasionally even these may come under consideration indirectly, as where ceremonials complained of represent doctrines (see *Read v. Bishop of Lincoln*, *supra*). With regard to appeals under the Church Discipline Act, 1840, 3 & 4 Vict. c. 86, which dealt with all kinds of clerical offences, though the cases now coming under it are limited for the most part to matters of doctrine, simony (*q.v.*), etc., if the archbishop hear the complaint in the first instance, his decision will be reviewed, but not if he heard it on appeal from a bishop. The Public Worship Regulation Act, 1874, 37 & 38 Vict. c. 85, again enacts, that on a representation being made by the archdeacon, or a churchwarden, or any three parishioners, or in the case of cathedral or collegiate churches, any three inhabitants of the diocese, to the bishop, that improper alterations, omissions, or additions, have been made to the services, rites, or ceremonies, the bishop may hear it, or else a special case may be stated and transmitted to the judge of the Provincial Courts of Canterbury and York, in which last case an appeal will lie to the Privy Council, such appeal not, however, going beyond the case stated by the judge, and fresh evidence not being admitted. And, lastly, the Clergy Discipline Act, 1892, 55 & 56 Vict. c. 32, introduces a new and exclusive procedure for cases of immorality on the part of clergymen, though not for questions of ritual or doctrine; the bishop of the diocese or, in the alternative, the parishioners, being allowed to prosecute such in the Consistory Court (*q.v.*) of the diocese, in which event either party to a case may appeal against the judgment of the Consistory Court in respect of any matters of law arising in the case to the Provincial Court (*q.v.*), or to the Privy Council, in either case finally. The procedure and practice in all ecclesiastical cases vary but little, and are similar to those in colonial appeals. (See PRIVY COUNCIL.)

Secondly, As to appeals from decisions under the Naval Prize Act, 1864, 27 & 28 Vict. c. 25. By sec. 5 of that Act an appeal lies from a decree or order of any PRIZE COURT (*q.v.*) to the sovereign in council as of right, in the case of a final decree or order, and in other cases with the leave of the Court making the decree or order. And by the Judicature Act, 1891, 54 & 55 Vict. c. 53, the High Court in England is constituted a Prize Court within the meaning of the Naval Prize Act, 1864, with full jurisdiction over the high seas and throughout the British dominions; and subject to the rules of that Court, all causes and matters within the jurisdiction of the High Court as a Prize Court are assigned to the Probate, Divorce, and Admiralty Division of the Court, subject to a right to appeal from that Division to the Privy Council (s. 4). See ADMIRALTY DIVISION. A right to appeal also lay under 26 & 27 Vict. c. 24 to the Privy Council from the Vice-Admiralty Courts, though only with leave of the judges of these Courts, in respect of any decree having the effect of a definitive

sentence or final order; but by 53 & 54 Vict. c. 27, the Vice-Admiralty Courts are abolished and their jurisdiction is transferred to the Colonial Courts of Admiralty, which may get authority to act in prize cases and under the Slave Trade Acts, 36 & 37 Vict. c. 88 and 42 & 43 Vict. c. 38, in which event the judgments of such Courts, if definitive, and if the Court appealed from grants leave of appeal, shall be subject to be reviewed by the Privy Council. The only special regulations as to prize appeals which need be mentioned are, that in the case of such from the Probate, Divorce, and Admiralty Division, the usual inhibition, or direction to the inferior court to abstain from further proceedings, must be abstracted within three months of the order or decree appealed from being issued, though the Judicial Committee may, if they see fit, extend this period, while in the case of prize appeals from Colonial Courts of Admiralty, unless the rules of these Courts provide otherwise, the petition of appeal must be lodged within six months of the date of the judgment appealed from, or of the date of the leave to appeal being granted (53 & 54 Vict. c. 27, s. 6).

III. THE COURT OF APPEAL AND APPEALS THERETO.

The Court of Appeal is one of the two permanent divisions of the Supreme Court of Judicature, the other division being the High Court of Justice (Jud. Act, 1873, ss. 3 and 4). It consists of certain *ex officio* judges, namely, the Lord Chancellor, president (Jud. Act, 1875, ss. 4 and 6); every person who has held the office of Lord Chancellor (Jud. Act, 1891, s. 1); the Lord Chief Justice of England (Jud. Act, 1875, s. 4); the Master of the Rolls (*ibid.*); and the President of the Probate, Divorce, and Admiralty Division (Jud. Act, 1881, s. 4); and of five ordinary judges (Jud. Act, 1881, s. 3), with the title of "Lords Justices of Appeal" (Jud. Act, 1877, s. 4).

The jurisdiction is threefold: original, as in the case of jurisdiction over its own officers (Jud. Act, 1873, s. 87, and *In re Whitehead*, 1885, 28 Ch. D. 614); concurrent, as where an application may, by the rules, be made to the Court below or to the Court of Appeal (see *Cropper v. Smith*, 1883, 24 Ch. D. 305); and appellate, which last includes the jurisdiction and powers of the Lord Chancellor and Court of Appeal in Chancery and Bankruptcy; of the Palatine Court; of the Lord Warden of the Stannaries, and of the Court of Exchequer Chamber; also the jurisdiction exercised by H.M. in Council, or the Judicial Committee on Appeal from the High Court of Admiralty (except when acting as a Prize Court (Jud. Act, 1891, c. 4, s. 3)), or from any order in lunacy (Jud. Act, 1873, s. 18). As such Appellate Court, it has power to hear appeals from any judgment or order of the High Court (Jud. Act, s. 19), save as hereinafter mentioned; all appeals from the full Court established by the Divorce Act, 1857 (Jud. Act, 1881, s. 9); from the Palatine Courts; from the Liverpool Court of Passage by leave from that Court; in registration and election cases by leave (Jud. Act, 1881, s. 14); all motions for a new trial, or to set aside a verdict where there has been a trial by jury (Jud. Act, 1890, s. 1; R. S. C., Order 39); and in matters of procedure and practice, every appeal from a judge is to the Court of Appeal (Jud. Act, 1894, s. 1 (4)).

For purposes of and incidental to its appellate jurisdiction, and also for the purpose of every other authority given to it by the Act of 1873, the Court of Appeal has all the powers, authority, and jurisdiction of the High Court (Jud. Act, 1873, s. 19). Both in appeals and on motions for new trials, it has the powers of the High Court as to amendment and otherwise (Order 58, r. 4; Order 39, r. 1, a); it has power to receive fresh evidence,

draw inferences of fact (*ibid.*); to order any verdict and judgment to be set aside, and a new trial to be had (Order 58, r. 5); also, in motions for new trials, it may direct issues and direct accounts and inquiries (Order 58, r. 10); and, generally, it has power to make any judgment or order which ought to have been made (Order 58, r. 4); and any order as to the costs of the appeal or motion for a new trial as may be just (*ibid.*; Order 39, r. 1, *a*; Jud. Act, 1890, s. 5).

A single judge of the Court of Appeal may, during the vacation, make interim orders in proceedings pending before the Court (Jud. Act, 1873, s. 52).

Every appeal from a final order or judgment must be heard by not less than three judges; from an interlocutory order or judgment, by not less than two judges (Jud. Act, 1875, s. 12).

All applications to the Court of Appeal, or to a judge thereof, are by motion (Order 58, r. 1), to be served upon all persons interested, or as the Court may direct (Order 58, r. 2), and the respondent may give a two or eight days' notice, as the case requires, of his intention to ask, upon the hearing of the appeal, that the judgment may be varied (Order 58, rr. 6 and 7).

The following table shows the time for appealing in various cases and the length of notice required, subject to special leave being given by the Court (Order 58, r. 15):—

Description.	Time for Serving Notice of Appeal.	Length of Notice
Cause { Final judgment in . . . Final order in . . . Interlocutory order in . .	3 months (Order 58, r. 15) 3 months (Order 58, r. 15) 14 days (Order 58, r. 15)	14 days (Order 58, r. 3) 14 days (Order 58, r. 3) 4 days (Order 58, r. 3)
Matter { Final order Interlocutory order . . . Order or decision in winding up or bankruptcy, or in any other matter not an action	14 days (Order 58, r. 15) 14 days (Order 58, r. 15) 14 days (Order 58, r. 9)	14 days (Order 58, r. 3) 4 days (Order 58, r. 3) 14 days if final, 4 days if interlocutory (Order 58, rr. 3 and 9)
Other Cases { Order on further consideration and summons to vary . . . Refusal of <i>ex parte</i> application	3 months (Order 58, r. 15(a)) Within 4 days from date of refusal (Order 58, r. 10)	14 days (Order 58, r. 3) 4 days (Order 58, r. 3)

The periods of fourteen days and three months, mentioned in the second column, are to be calculated, in the case of an appeal from chambers, from the time when the order was pronounced, or the appellant had notice thereof, and in all other cases from the perfecting of the judgment or order, and, in the case of the refusal of an application, from the date of the refusal (Order 58, r. 15). The Court may order security for the costs of the appeal to be given (Order 58, r. 15), and an appeal does not operate as a stay of execution unless otherwise ordered (Order 58, r. 16), but interest is to be allowed for such time as execution may have been delayed by the appeal (Order 58, r. 19):

No appeal lies in the following cases: From decision of Court of Crown Cases Reserved, or from any criminal cause or matter (Jud. Act, 1873, s. 47); from orders made by consent, or as to costs only (*ibid.* s. 48); from orders in

chambers (not being matters of procedure and practice), except by leave (*ibid.* s. 50; and see Jud. Act, 1894, s. 1. 4; Order 54, r. 23); from determination of Divisional Courts, under sec. 45 of Jud. Act, 1873, or under Jud. Act, 1894, s. 1, subs. 5; except by leave; from an award or certificate on a compulsory reference to arbitration (Jud. Act, 1884, s. 8); where any statute provides that the decision of a court or judge is to be final (App. Jur. Act, 1876, s. 20); from an order extending time for appealing (Jud. Act, 1894, s. 1 (1) *a*); from any interlocutory order or judgment without leave (*ibid.* *b.*), save in the cases there mentioned, and in cases of procedure or practice (Jud. Act, 1894, s. 1 (4)), and an order refusing unconditional leave to defend (*ibid.* (2)); from an order giving such leave (*ibid.* (3)); from decisions of the High Court in registration and election cases (Jud. Act, 1881, s. 14); or as a prize court (Jud. Act, 1891, s. 4). And although by sec. 19 of the Jud. Act of 1873 an appeal is given from any "judgment or order" of the High Court, yet no appeal lies where the jurisdiction of the High Court has been exercised, not judicially, but consultatively, or as an arbitrator (see *Ex parte Co. Co. of Kent* [1891], 1 Q. B. 725; *In re Bracken*, 1889, 43 Ch. D. 1; *Burgess v. Morton* [1896], App. Cas. 136). All the principal cases in which an appeal does not lie are here given, but the list is not exhaustive, and the current books of practice should be referred to. And although an appeal may lie, the Court may decline to hear it, if it would be against the general principles of the Court to do so, as where judicial discretion has been exercised, or an undertaking given not to appeal, or the stake is too small.

IV. TO DIVISIONAL COURTS.

There are at the present time (1897) two Divisions of the High Court of Justice, in which the judges of those Divisions sit from time to time as Divisional Courts, or as a Divisional Court, namely, the Queen's Bench Division and the Probate, Divorce, and Admiralty Division, and no other. A Divisional Court in the former division is composed of two judges, or of more than two, if the president of that Division, with the concurrence of not less than two other judges, thinks it expedient (Judicature Act, 1884, s. 4). In the latter, such Court is composed of the president and the one justice of that division—there being only two judges thereof.

The business of Divisional Courts is original and appellate. As to the former, these Courts are to hear such causes and matters as are not proper to be heard by a single judge. (Judicature Act, 1873, s. 40), and points in a case, or a case, may be reserved for argument before them (Judicature Act, 1873, s. 46); and, as regards the Queen's Bench Division, it may transact such business as would formerly have been heard *in banc* (see *BANC*) in the Queen's Bench, Common Pleas, and Exchequer (*ibid.* s. 41). They may also be held for the transaction of any business, which by rules of Court is directed to be heard by them (Appellate Jurisdiction Act, 1876, s. 17); and Order 59, r. 1, provides, *inter alia*, that proceedings on the Crown side and on the Revenue side of the Queen's Bench Division, cases of *habeas corpus* in certain events, and special cases, may be so heard (see Judicature Act, 1873, ss. 40–42; Appellate Jurisdiction Act, s. 17; Judicature Act, 1884, s. 4).

It is, however, to the jurisdiction and powers of Divisional Courts as Courts of Appeal that this note is chiefly directed. This jurisdiction is principally based upon the 45th sec. of the Judicature Act, 1873, which provides that all appeals from Petty or Quarter Sessions (*q.v.*), from a County Court, or from any other inferior court which might before

the passing of the Judicature Act, 1873, have been brought to any court or judge whose jurisdiction is by that Act transferred to the High Court, may be heard by Divisional Courts, and their determination of such appeal is final, unless leave is given to appeal to the Court of Appeal (Judicature Acts, 1873, s. 45; and 1894, s. 1 (5)); and every case stated by a Court of Quarter Sessions, except under 11 & 12 Vict. c. 78 and 12 & 13 Vict. c. 45, is to be deemed an appeal (Judicature Act, 1894, s. 2 (1), and see further as to powers of the Court in such cases, *ibid.* (2) (3) (4)). In all cases where there is a right to appeal to the High Court from any court or person, except in matters of procedure and practice (see *M'Harg v. Universal Stock Exchange*, [1895], 2 Q. B. 83), the appeal is to be heard and determined by a Divisional Court, constituted as may be prescribed by rules, and its determination of such appeal is final, unless leave to appeal be given by that Court or the Court of Appeal (Judicature Act, 1894, s. 1 (5)).

The following matters relating to appeals are to be heard and determined by Divisional Courts. In the Queen's Bench Division, appeals from revising barristers, and proceedings relating to election petitions, parliamentary and municipal (Order 59, r. 1, *b.*; Judicature Act, 1881, s. 14); appeals from chambers in the Queen's Bench Division, except in matters of practice and procedure (Judicature Act, 1894, s. 1 (4); see *ibid.* 1873, s. 50; Order 59, r. 1 (*i.*)); from a question of law, on the award or certificate of an arbitrator or referee in a compulsory reference (Order 59, r. 3); all appeals under the Judicature Act, 1873, s. 45, and the County Courts Act, 1888, s. 120, save those allotted to the Divisional Court of the Probate, Divorce, and Admiralty Division, *infra*. See REVISING BARRISTERS; ELECTION PETITIONS; CHAMBERS; ARBITRATION.

In bankruptcy appeals from County Courts, the appeal is to a Divisional Court, of which the judge to whom bankruptcy business is assigned shall, for the purpose of hearing the appeal, be a member (Bankruptcy Appeals County Courts Act, 1884); and by the County Courts Act, 1888, s. 120, the existing procedure of the High Court on appeals is adopted.

In the Probate, Divorce, and Admiralty Divisions, the Divisional Court is to hear appeals, in probate cases from inferior courts, under sec. 11 of the Summary Jurisdiction (Married Women) Act, 1895; in Admiralty cases from inferior courts, under the Merchant Shipping Act, 1894 (Order 59, rr. 4 and 4A, as altered by recent legislation). And in both Divisions proceedings are to be heard which are directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final (Order 59, r. 1 (*e.*)).

The following rules now apply to appeals to the Queen's Bench Division (and it is believed will shortly apply to appeals to the Probate, Divorce, and Admiralty Division), from County Courts and other inferior courts of record of civil jurisdiction in all proceedings (Order 59, r. 9); and although the existing rule excludes bankruptcy, it would seem that, since the County Courts Act, 1888, s. 120, the following procedure will apply in that case also (see *supra*). The words "appeals from inferior courts" (in Order 59) include every appeal, motion, or application, to set aside or vary any verdict or judgment in, or of, any County Court, or for a new trial in an action remitted to the County Court for trial or otherwise (Order 59, r. 18). As to the procedure in appeals to Divisional Courts; every appeal is to be by notice of motion, stating the grounds of appeal, and whether the whole or part of the judgment, etc., is appealed from (Order 59, r. 10). It is an eight days' notice (*ibid.*), and must be served on every party directly affected by the appeal (*ibid.*), within twenty-one

days from the date of the judgment, etc., appealed from, such period being calculated from the perfecting of such judgment, etc., or from the time at which the finding is made, or refusal given (Order 59, r. 12), and within the same time, twenty-one days, the appeal, if in the Queen's Bench Division, must be entered by lodging a proper notice in the Crown Office department of the Central Office, and in other cases in the proper registry (see Order 59, r. 11). The appeal must be also entered in the proper list, and will come on to be heard in its order (Order 59, r. 15). The Court must be furnished with the judge's notes in any question of law raised at the trial, or, if this is impossible, then with a shorthand note or affidavit of what happened at the trial below (Order 59, r. 13; County Court Act, 1888, s. 121; *Barber v. Burt* [1894], 2 Q. B. 427; *R. v. Kerr*, 1894, 70 L. T. 595). The appeal does not act as a stay, unless the inferior court has so ordered, or unless security is given (Order 59, r. 14).

The Court has power to extend the time for appealing, power to amend (Order 59, r. 16), power to draw inferences of fact and to order a new trial (County Courts Act, 1888, s. 122); and as to appeals from Quarter Sessions, see Judicature Act, 1894, s. 2; and generally the rules for the time being in force, with respect to appeals from the High Court to the Court of Appeal (see *Appeals to Court of Appeal, supra*), are to govern, so far as practicable, appeals, to Divisional Courts (Order 59, r. 17).

V. MISCELLANEOUS APPEALS.

APPEALS TO QUARTER SESSIONS.—A general right of appeal from courts of summary jurisdiction to quarter sessions is given by s. 19 of the Summary Jurisdiction Act, 1879, which provides that where a person, who has not pleaded guilty, or admitted the truth of the information or complaint, is adjudged by a conviction or order to be imprisoned without the option of a fine, he shall be entitled to appeal to a court of general or quarter sessions, "provided that this section shall not apply where the imprisonment is adjudged for failure to comply with an order for the payment of money, for the finding of sureties, for the entering into any recognisance, or for the giving of any security." The fact that a person, when charged before a court of summary jurisdiction, admits the act alleged against him, but asks that the case may be heard, with a view to show mitigating circumstances, is not a plea of guilty, or "an admission of the truth of the information or complaint," which deprives him of his right to appeal (*R. v. Essex Justices, Stark ex parte*, 1892, 61 L. J. M. C. 120); but an adult person, i.e. a person of the age of sixteen or upwards, charged with an indictable offence, who consents to be dealt with summarily, and is thereupon convicted, cannot exercise the right of appeal under s. 19 (*R. v. London Justices, Lambert ex parte* [1892], 1 Q. B. 664).

In the metropolis there is a wider right of appeal to quarter sessions. By s. 50 of the Metropolitan Police (Courts) Act, 1839, it is provided, that in every case of summary order or conviction, before a metropolitan police magistrate, in which the sum or penalty adjudged to be paid is more than £3, or in which imprisonment for more than one calendar month is ordered, the person aggrieved may appeal to the next general or quarter sessions. This section is not applicable, however, to revenue cases; in these cases the provisions of the particular statute apply (s. 56).

No appeal lies from the dismissal of a charge, unless a right to appeal from such dismissal is expressly given by statute. Such an appeal is given by a few Acts, e.g., the Excise Management Act, 1827, s. 82; the Excise Management Act, 1834, s. 23; the Diseases of Animals Act, 1894, s. 55.

The procedure to be followed in appeals to quarter sessions is prescribed by s. 31 of the Summary Jurisdiction Act, 1879, as amended by the provisions of the Summary Jurisdiction Act, 1884. The appeal lies to the court of general or quarter sessions that may have been prescribed by the Act under which the information or complaint has been laid, or if no court is prescribed, the appeal is to the next practicable court of general or quarter sessions having jurisdiction in the county, borough, or place for which the court of summary jurisdiction from whose decision the appeal is taken acted, and holden not less than fifteen days after the day on which the decision complained of was given.

A notice of appeal in writing, signed by the appellant or his agent, must be given to the other party, and to the clerk of the court of summary jurisdiction whose decision is being appealed from, within seven days after the day when the decision was given. The notice need not be in any special form, but it must set out the general grounds of appeal. It may be sent as a registered letter, in which case it is to be deemed to have been served at the time when it would be delivered in the ordinary course of post (*S. J. Act, 1879, s. 31, subs. 2, 6; S. J. Act, 1884, s. 6; R. v. Glamorganshire Justices, 1889, 22 Q. B. D. 628*). A seven days' notice is not necessary in the case of an appeal from an order for the removal of a pauper, as such orders are excepted from the Summary Jurisdiction Acts (*R. v. Somersetshire Justices, 1889, 22 Q. B. D. 625*). Addressing the notice of appeal to the clerk to the justices, instead of to the justices personally, was held a sufficient compliance with subs. 2, in *R. v. Essex Justices, Stark ex parte, ubi supra*. But where a notice of appeal against an affiliation order was served on, and accepted by, the solicitor who had appeared for the mother at petty sessions, it was held that the service was bad, as the solicitor's retainer was at an end upon the making of the order, and he had therefore no authority to accept service (*R. v. Oxfordshire Justices [1893], 2 Q. B. 149*).

In addition to giving notice, the appellant must, within the prescribed time, or, if no time is prescribed, within three days after the day on which notice of appeal was given, enter into a recognisance before a court of summary jurisdiction, with or without a surety or sureties as that Court may direct, conditioned to appear at the sessions and try the appeal, to abide the judgment of the Court thereon, and to pay such costs as may be awarded. The court of summary jurisdiction may accept a deposit in lieu of a recognisance (*S. J. Act, 1879, s. 31, subs. 3*). It is essential that the recognisance be entered into, or the deposit made, after and not before notice of appeal has been given, so that the Court may have the grounds of appeal before it in fixing the amount of the recognisance or deposit (*R. v. Anglesey Justices, 1892, 61 L. J. M. C. 143; R. v. Cheshire Justices, 1896, 60 J. P. 585*). The recognisance may be entered into (or deposit made) before any court of summary jurisdiction having the notice of appeal before it (*R. v. Durham Justices [1895], 1 Q. B. 801*). A recognisance entered into after the expiration of the three days is not void, and although the court of quarter sessions has no jurisdiction to hear an appeal in such a case, it has jurisdiction to estreat the recognisance in case of non-payment of the respondent's costs in connection with the appeal (*R. v. Glamorganshire Justices, 1890, 24 Q. B. D. 675*).

On the appellant entering into a recognisance, he may, if in custody, be released, if the court of summary jurisdiction thinks fit (*S. J. Act, 1879, s. 31, subs. 4*).

If, when the appeal comes on at quarter sessions, neither the appellant

nor the respondent appears, the appeal is struck out of the list; if the appellant appears, and the respondent does not, the Court will, on the appellant proving service of his notice of appeal, quash the conviction or order appealed against (*R. v. Surrey Justices and Bell* [1892], 2 Q. B. 719); if the appellant does not appear, but the respondent does, the order or conviction will be affirmed. If both parties are present and ready to proceed, the appellant may first be called upon to prove service of his notice of appeal, but subject to this the respondent almost invariably begins, he having to prove the case against the appellant. The whole charge is gone into *de novo*, neither party being confined to the evidence given before the court of summary jurisdiction (see Archbold, *Quarter Sessions Practice*, 4th ed., pp. 635 *et seq.*). The court of quarter sessions may adjourn the hearing, and may confirm, reverse, or modify the decision of the court of summary jurisdiction, or remit the matter, with its opinion thereon, to a court of summary jurisdiction acting for the same county, borough, or place, as the court by whom the conviction or order appealed against was made, or may make such other order in the matter as it may think just, and may by such order exercise any power which the court of summary jurisdiction might have exercised, and such order is to have the same effect, and may be enforced in the same manner, as if it had been made by the court of summary jurisdiction. It may also make orders as to costs (S. J. Act, 1879, s. 31, subs. 5). When a decision is not confirmed by the court of quarter sessions, the clerk of the peace is required to send to the clerk of the court of summary jurisdiction whose decision is in question, for entry in his register, a memorandum of the decision of the court of quarter sessions. A similar memorandum is also to be indorsed on the conviction or order; and a copy of such memorandum is declared to be sufficient evidence of the decision in every case where a copy or certificate of the conviction or order would be sufficient (S. J. Act, 1879, s. 31, subs. 6).

APPEALS TO QUARTER SESSIONS IN LICENSING MATTERS.—Under the Licensing Act, 1828, s. 27, as amended by s. 75 of the Licensing Act, 1872, an appeal lies by the applicant, and, apparently, also by the owner of the licensed premises (see *Sharp v. Wakefield* [1891], App. Cas. 173) from the refusal of licensing justices to renew or transfer a licence. No appeal lies, however, from a refusal to grant a new alehouse licence; nor is there any appeal from any act of a justice with respect to the grant of new certificates under the Wine and Beerhouse Acts, 1869 and 1870 (s. 27, Licensing Act, 1874). Licensing justices are a court of summary jurisdiction, so that the procedure on appeal as to notices, etc., is governed by the provisions of the Summary Jurisdiction Acts (*R. v. Glamorgan-shire Justices* [1892], 1 Q. B. 621; *R. v. West Riding of Yorkshire Justices, Hawkins, ex parte*, 1895, 64 L. J. M. C. 192). Notice of appeal must be given to the person opposing the renewal before the justices as “the other party,” within s. 31, subs. 2 of the Summary Jurisdiction Act, 1879; and the court of quarter sessions has jurisdiction to order such person to pay the costs of the appeal, even although he does not appear at the hearing (*R. v. Kent Justices* [1896], 2 Q. B. 306. (For procedure as to notice, etc., see *supra*, APPEALS TO QUARTER SESSIONS.)) These appeals do not lie to a borough recorder (*R. v. Bristol Recorder*, 1854, 24 L. J. M. C. 43).

S. 52 of the Licensing Act, 1872, gives a right of appeal to any person aggrieved by any order or conviction made by a court of summary jurisdiction. The owner of the licensed premises is not a “person aggrieved” (see AGGRIEVED) by the conviction of his tenant, and therefore he has no right of appeal against the conviction (*R. v. Andover Justices*, 1886, 16 Q. B. D.

711). But where the tenant's licence has been forfeited and the owner applies for a temporary licence under s. 15 of the Licensing Act, 1874, which is refused, he is entitled to appeal (*R. v. West Riding of Yorkshire Justices*, 1883, 11 Q. B. D. 417). In these cases the appellate jurisdiction of borough recorders is not excluded. The procedure as to notices, etc., is the same as in ordinary appeals to quarter sessions.

At quarter sessions, in appeals from refusals to renew or transfer, "the appellant usually begins, because as the appeal is in the nature of a re-hearing, the appellant practically makes a fresh application for the renewal or transfer of his licence, but this is a matter of procedure which depends upon the practice of each particular sessions, and is entirely in the discretion of the Court" (Archbold, *Quarter Sessions Practice*, 4th ed., p. 712). See LICENSING.

APPEALS FROM THE COMPTROLLER-GENERAL OF PATENTS.—*Patents.*—An appeal lies to the law officer, under the Patent, etc. Acts, 1883–1888, where the comptroller—

1. Requires an amendment of an application, specification, or drawings (s. 7 (2));
2. Refuses a patent on the application of a second applicant (s. 7 (6));
3. Requires the amendment of a complete specification (s. 9 (2));
4. Gives a decision on an opposition to the grant (s. 11 (2));
5. Gives a decision on an opposition to a request seeking leave to amend a specification (s. 18 (3));
6. Refuses leave to amend a specification (s. 18 (6)).

Appeals have also been taken from decisions of the comptroller-general, under sec. 33, that a patent has, or has not, more than one invention in it.

For Law Officer's Rules (made under s. 38) regulating the practice and procedure on appeals, see Edmunds' *Law of Patents*, 1890, p. 589. For law as to appeals, Edmunds' *Index*, "Appeal"; Cunynghame, *Patent Practice*, 1894, pp. 245, 255–257; For cases, Goodeve's *Patent Practice before Comptroller*, 1893.

It has recently been decided by the House of Lords (*Moser v. Marsden*, 1895, 13 R. P. C. 24), that where an amendment has been allowed by the law officer, it cannot be questioned except on the ground of fraud. The law officers will no longer be so ready to give leave (*Parkinson's Patent*, 1896, 13 R. P. C. 572).

There is no appeal from the law officer's decision on an amendment, and a prohibition does not go against him (*Van Gelder's Patent*, 1888, 6 R. P. C. 28).

Trade Marks.—An appeal lies to the Board of Trade under the above Acts, where the comptroller—

1. Refuses to register a trade mark (s. 62 (4));
2. Gives a decision on an opposition to registration (s. 69 (3)); either the applicant or opponent may appeal.

In both cases the Board of Trade may, under s. 62 (5), and s. 69 (4), refer the matter to the Court, and this is usually done.

These appeals were introduced by the Act of 1883. The practice is governed by the *Trade Mark Rules*, 1890, see Kerly, 1894, "Trade Marks," pp. 78 *et seq.* See Kerly, *Forms* p. 610. The comptroller may require several claimants to submit their claims to the Court (s. 71).

Appeal from Conviction under Merchandise Marks Act, 1887.—By sec. 2 (5) any person aggrieved by a conviction made by a court of summary jurisdiction may appeal to quarter sessions.

The appeal will be governed by sec. 31 of the Summary Jurisdiction Act, 1879. (See Stone's *Justice's Manual*, 28th ed., 1895, pp. 99, 220.)

[The right of appeal, etc., under particular statutes will be dealt with under the special subjects—EXCISE; POOR; LUNACY, etc.].

Appearance, Entering.—Appearance is the proceeding by which a defendant submits to the jurisdiction of the Court. The rules are contained in *Rules of the Supreme Court*, 1883, Order 12; and the *Crown Office Rules*, 1886, 83–98.

In actions, appearance is entered at the Central Office, or a District Registry, within eight days, if the defendant is within the jurisdiction; if he is not, the time is prescribed by the order of service of notice of writ, fixed according to the country where he may be.

Any irregularity in the issue or service of the writ must be objected to before appearance (*In re Orr-Ewing*, 1882, 22 Ch. D. 463).

But a conditional appearance may be entered, without order, on the fiat of a Master, while application is being made to set aside the service of the writ; but the application may also be made under r. 30 without entering a conditional appearance. A partner may appear under protest, denying that he is a partner, by Order 48 A., r. 7. Appearance gratis may be entered before actual service of the writ, if the defendant wishes to make an immediate application to the Court; but this cannot be done where a person not a party to an action, but made defendant in a counter-claim, has not been served with statement of defence (*Fraser v. Cooper*, 1883, 23 Ch. D. 685). If appearance is entered by mistake, it may be withdrawn on motion or summons by either plaintiff or defendant, and by consent; and if entered without authority by a solicitor, the defendant may have it set aside (see Daniell's *Chancery Forms*, p. 162, 4th ed.; and *In re Gray*, 1892, 65 L. T. 743). After judgment, appearance can only be entered either by consent or on special motion or summons in the Chancery Division, and in the Queen's Bench Division on summons before a Master (Daniell's *Chancery Forms*, p. 157). If appearance is entered after the prescribed time, the defendant is not entitled, without orders of Court or a judge, to any further time for delivering his defence or otherwise (r. 22). If a writ is amended, the original appearance stands good for it (*Paxton v. Baird* [1893], 1 Q. B. 139). The mode of entering appearance to a writ of summons is prescribed by Order 12, r. 8; to third party notices, by Order 16, r. 49; to counter-claims, Order 21, r. 13; to originating summons, Order 55, r. 23; to notice of judgment or order, Order 16, r. 41; to appearance of partners in a firm, by Order 48 A., rr. 5, 7. Notice of having entered appearance must be given, on the day on which appearance is entered, in accordance with r. 9; and if the action is in a District Registry and appearance is made in London, if default is made in giving notice thereof plaintiff may sign judgment; but in London actions, search must be made first (see *Smith v. Dobbin*, 1877, 3 Ex. D. 338).

If defendant requires a statement of claim (*q.v.*), he should give notice on entering appearance. Entry of appearance may be made either by solicitor or defendant in person, or by a third person on his behalf (*Oake v. Moorecroft*, 1869, L. R. 5 Q. B. 76). The appearance of a company or corporation must be by solicitor; and partners must appear individually in their own names (Order 48 A. rr. 5 and 7).

As to appearance by friendly societies, hospitals, clubs, infants, lunatics, trustees, trustee in bankruptcy, etc., see *Annual Practice*, 1897, pp. 299–301;

and for costs in case of separate appearance, p. 1172, and cases cited in note (8), and Order 12, r. 17, and Order 65, r. 27.

A solicitor who fails to enter an appearance in accordance with his undertaking is liable to attachment (Order 12, r. 18).

In Probate and Admiralty actions, persons not named in the writ, but who are interested in the suit, may intervene and appear (Order 12, rr. 23 and 24); and, in an action for the recovery of land, by leave of the Court any person who shows that he is in possession, either by himself or his tenant (r. 25). Any person appearing in such an action may limit his defence to a part only of the property mentioned in the writ.

The defendant to any indictment, information, or injunction in the Queen's Bench Division, or removed there, must enter appearance in a book at the Crown Office; but in treason or felony he must appear in open court unless he is allowed to plead by solicitor, when the appearance is entered as just stated (*Crown Office Rules*, 1886, 83-98).

In default of appearance, plaintiff may sign judgment under the rules of Order 13. Where the writ is indorsed for an account, or taking an account is involved, the requisite order will be made. On a liquidated demand, final judgment is entered for the amount, with interest at the rate specified, if any, or, if not, at five per cent. to the date of the judgment, and costs (Order 13, r. 3); and if there are several defendants, judgment may be signed and execution issued against those who have not appeared, without prejudice to the right of proceeding against the others. Where the claim is for detention of goods and pecuniary damages, or either of them, interlocutory judgment may be entered, and the value of the goods, or the damages, may be assessed as may be directed (Order 13, rr. 5 and 6); if a liquidated demand is joined to such a claim, final judgment may be entered for that portion. In an action for the recovery of land, judgment is entered therefor, and any claim joined therewith is assessed under the preceding rules. As to costs in this case, see *Annual Practice*, Order 13, r. 9, p. 321. In other actions to which the rules apply, where there is no special indorsement under Order 3, r. 6, nor claim for an account, the action proceeds as if appearance had been entered (Order 13, r. 12).

As to default in appearance by infant or person of unsound mind, see Order 13, r. 1.

Appellate Jurisdiction.—See APPEALS.

Appendant and Appurtenant.—The words *appendant* and *appurtenant* are commonly used as predicates to denote the connection between a principal hereditament and another hereditament which is said to be appendant or appurtenant thereto, and is sometimes styled the adjunct or the accessory: the connection between them being such that, in general, a conveyance of the principal carries with it the adjunct without specific mention of it in the grant. See ACCESSION OF PROPERTY. Things appendant can be claimed by prescription (*q.v.*) only; that is to say, the grant under which they are presumed to have arisen is by hypothesis prior to the origin of legal memory; whereas things appurtenant can be claimed either by prescription or by express grant (Co. Litt. 121b; *Sacheverill v. Porter*, 11 Car. 1.; Cro. (3), 482). As a general rule, the principal hereditament and the adjunct thereto cannot be both corporeal or both incorporeal (Co. Litt. 121b; *Tyrringham's case*, 26 & 27 Eliz. 4 Rep. 36).

But Hargrave has observed that this rule is not of universal application to things appurtenant (Co. Lit. 121*b*, n. 7). There must be a propriety of relation, styled in the old books an "agreement in quality," between the two, making them suitable to be enjoyed together; for example, common of estovers cannot be appurtenant to land without a house; nor can common of pasture be appurtenant to a house without land; because in such case the principal does not admit of the appropriate use of the adjunct. For further information, see heads under which classes of appendant and appurtenant hereditaments are separately discussed, such as COMMON; ADVOWSON.

Appertaining is generally equivalent to appurtenance. There is, however, a difference between the devise of a house and the appurtenances, and of a house with the lands appertaining thereto—by the latter expression *some* lands being intended, the primary sense of appertaining being excluded (1 Jarm. 782). See APPENDANT AND APPURTENANT.

Apply, Liberty to.—The words "Liberty to Apply" have a well-known meaning, and in a judgment or order, when drawn up, they are amplified as follows:—"And any of the parties are to be at liberty to apply [to this Court or in chambers] as they shall be advised," or "And let any of the parties be at liberty to apply in chambers for the appointment of a receiver [or otherwise as the case may be], and otherwise (generally) to apply as they may be advised."

It is often impossible in the Chancery Division to decide all the points in which existing parties are interested until a future period. If the income of a fund belongs to A. for life, the fund itself being distributable on his death among a certain class, the Court directs the income to be paid to A. for life, and that on his death the parties interested in the fund shall have liberty to apply. The final nature of the decree remains, but persons having an interest under it may apply in a summary manner, without again setting the case down. In the Court of Chancery, the application was made by petition or motion, and after 15 & 16 Vict. c. 80, s. 28, sometimes by summons in chambers, where such liberty was expressly given (*Winkworth v. Winkworth*, 1863, 32 Beav. 233). In the Chancery Division, liberty to apply in chambers is often given, and sometimes in lieu of a second further consideration (*Gilbert v. Russell*, W. N. 1875, 225). Where an order is not of a final nature, "liberty to apply" is implied; and an accidental omission of it from a judgment can be remedied (*Fritz v. Hobson*, 1880, 14 Ch. D. 542; *Penrice v. Williams*, 1883, 23 Ch. D. 353). As to its application to costs not expressly provided for, see *Kendall v. Marsters*, 1860, 2 De G., F. & G. 200; *Viney v. Chaplin*, 1859, 3 De G. & J. 282; *Fritz v. Hobson*, *ubi supra*; *Gosnell v. Bishop*, 1888, 38 Ch. D. 385; Seton, 5th ed., 160.

[See further, *Dan. Ch. Pr.*, 2nd ed., 987; 3rd ed., 895–896; Seton on *Decrees*, 5th ed., 159–160.]

Appointment of Trustees.—See TRUSTS.

Appointment, Power of.—See POWER OF APPOINTMENT.

Apportionment.—This cometh of the word *portio, quasi partio*, which signifieth a part of the whole; and apportion signifieth a division or partition of a rent, common, etc., or a making of it into parts (Co. Lit. 147b). The apportionment thus defined is of very ancient date, and is usually known as apportionment in respect of estate. The rent, etc., is apportioned, *i.e.* divided, in certain cases where it is unjust that the whole of it should be paid to a single person. Two causes may bring about this result: the act of the parties, and the act of law. If a lessee, by eviction under title paramount, or by forfeiture or surrender, lose possession of a part of the demised property, from every part of which the rent issues, he becomes liable only to pay a rent apportioned in value to the remainder; while an assignment by the reversioner of part of his reversion carries with it an apportioned part of the rent incident to the whole reversion, though the assignor and assignee cannot bind the lessee without his consent by an agreement to apportion the rent, unless the apportionment be made by a jury (see *Mayor of Swansea v. Thomas*, 1883, 10 Q. B. D. 48). But as a condition of re-entry in a lease could not, at common law, be apportioned by the act of a party, the assignee of the reversion of part of the demised premises could not re-enter for a condition which was broken. This, however, in the case of re-entry for non-payment of rent which has been legally apportioned as just explained, has been altered by 22 & 23 Vict. c. 35, s. 3; whilst *as regards leases made after the year 1881*, the effect of the Conveyancing Act, 44 & 45 Vict. c. 41, s. 12, is to apportion all conditions in their nature apportionable which previously would have run with the unsevered reversion.

In the next place, where by act of law a lease of premises becomes inoperative as regards the whole subject-matter of the demise, the rent is apportioned in respect of the part as to which the demise is valid; and apportionment also arises where part of the land demised is actually destroyed by act of God (*q.v.*), as where it is permanently covered by an irruption of the sea. There are, moreover, many statutes which provide for apportionment when parts of lands subject to a demise or to a charge are required for public purposes, probably the commonest case being that under the Lands Clauses Act, 1845 (see 8 & 9 Vict. c. 18, ss. 116, 119).

Apportionment, however, has a more technical meaning when used as a legal term to denote the division of the beneficial interest in payments which, by common law, are indivisible. At common law, rents and all payments at fixed periods in the nature of income, except interest on money lent, were not apportionable in respect of time. The principle of the Apportionment Acts is to presume that such sums accrue *de die in diem*. Although earlier Acts are still unrepealed, they are practically superseded by the Act of 1870, 33 & 34 Vict. c. 35, an Act which applies to all instruments, whether coming into operation before or after the date of its passing. By this Act (s. 2) all rents, annuities, dividends (see these words defined in s. 5), and other periodical payments in the nature of income are to be considered as accruing from day to day, and to be apportionable in respect of time accordingly. But it is provided (s. 3) that the apportioned part of such rent, etc., shall only be payable or recoverable, in the case of a continuing payment, when the entire portion of which it forms part becomes itself payable, and, in the case of a payment determined by re-entry, death, or otherwise, only when the next entire portion would have been payable if it had not so determined. And it is further provided (s. 4) that persons are to have the same remedies for

recovering such apportioned parts as for the entire portions, though (in the case of rents) tenants are not to be resorted to for the apportioned parts specifically, their recovery being enforceable only against the heir or other person who, if the rent had not been apportionable, would have been entitled to recover it in its entirety. The Act, unlike the earlier Acts, extends to payments not made under any instrument in writing (s. 1), but not to any case where it may be expressly excluded by stipulation to that effect (s. 7); nor does it render apportionable any annual sums made payable in policies of assurance (s. 6).

The decisions on this Act have mainly fallen under two heads: apportionments of rent due under leases where an alteration of the right to receive, or the liability to pay, occurs at a time between the days fixed for payment; apportionments of income between the representatives of a limited owner and the remaindermen upon the determination of the limited interest at a time between the dates when such income became due.

The object of the Act was clearly only to divide accruing periodical payments between the persons who, by reason of death, assignment, etc., become entitled to portions of the same; but it has received such an interpretation from the Courts as to materially affect contracts, in a way apparently which can hardly have been anticipated when the Act was passed. With regard, for instance, to decisions on the first class of cases, where a tenancy is determined in the middle of a quarter, no rent for such quarter, in the absence of any arrangement, was formerly payable at all (*Grimman v. Legge*, 1828, 8 Barn. & Cress. 234). Now, however, an amount proportioned to the time of actual occupation has been held to be recoverable from the tenant (*Swansea Bank v. Thomas*, 1869, 4 Ex. D. 94; *Hartcup v. Bell*, 1883, C. & E. 19), unless the determination be due to a wrongful act or default on the part of the landlord (*Clapham v. Draper*, 1885, C. & E. 484). Similarly, where a lease is held by a company which goes into liquidation in the middle of a quarter, though the Act does not entitle the landlord to petition as creditor for an apportioned rent, inasmuch as it provides, as already seen, that such apportioned rent becomes payable when, and only when, the whole rent becomes due (*Re United Club Co.*, 1889, 60 L. T. 665), it empowers him, when the quarter has expired, to prove for his rent apportioned down to the commencement of the winding-up (*In re South Kensington Stores*, 1881, 17 Ch. D. 161); whilst a similar result follows, by force of a special statutory provision, in the case of the bankruptcy of an ordinary tenant (46 & 47 Vict. c. 52, sched. 2, r. 19). And the application of the Act has been still further widened by the most modern decisions upon it; for it has been held that it apportions liabilities as well as rights, so that, as the law stands at present, it seems that if a tenant assign his interest in the middle of a quarter, the assignee will become liable when the quarter day arrives only for rent apportioned from the time of the assignment to him (*In re Wilson*, 1893, 62 L. J. Q. B. 628; *In re Howell* [1895,] 1 Q. B. 844).

There are numerous decisions upon the second class of cases, namely, the apportionment under the Act of sums paid by way of income, which have been accruing during the continuance of the limited estate but become payable after its determination, between the representatives of the limited owner and the remainderman. The result of the authorities may be stated to be: first, that all dividends (see the definition in sec. 5) paid by public companies, whether paid at fixed periods or not, are apportionable, unless it appear that the payment is in fact a payment of capital;

and in deciding on the real character of the payment, the Court has regard to all the circumstances under which it is made, and more especially the powers and intention of the company making the distribution (*Bouch v. Sproule*, 1887, 12 App. Cas. 385; *In re Armitage* [1893], 3 Ch. 337); next, if the payment be not a dividend as defined in sec. 5, it is not a "periodical payment" within sec. 2, unless paid at fixed periods in pursuance of a binding obligation, and not at periods that are in the discretion of the payer (*Jones v. Ogle*, 1873, L. R. 8 Ch. 192; *In re Cox's Trusts*, 1878, 9 Ch. D. 159; *In re Griffith*, 1879, 12 Ch. D. 655). Thus the profits of a private business, which the managers can divide at any time as they in their discretion choose, are not apportionable (*Jones v. Ogle*, *supra*).

A point of importance as to the effect of apportionment between persons entitled to income and those entitled to capital, where the stocks representing the capital are sold with an accrued or accruing dividend, was decided in *Bulkeley v. Stephens* [1896], 2 Ch. 241. Before the Act of 1870, the practice of the Courts of Equity was to disregard claims by persons entitled to income to have an apportionment made of capital so realised in their favour, except under special circumstances (*Freman v. Whitbread*, 1866, L. R. 1 Eq. 266); and Stirling, J., in *Bulkeley v. Stephens*, *supra*, decided that the Apportionment Act has not altered this practice. Special circumstances within the meaning of this rule would appear to exist where an apportionment is necessary to compensate persons claiming it for a right lost through no fault of theirs, either by delay or alteration in the execution of the trusts under which the realisation of capital was effected.

Another instance of equitable apportionment apart from statute is that which arises in the execution of trusts where, owing to the postponement of distribution, it becomes just to allocate, as between persons entitled to income and those entitled to capital, the accumulations during the period of such postponement. The general rule applied in such cases will be found in *In re Earl of Chesterfield's Trusts*, 1883, 24 Ch. D. 643, as modified by *In re Goodenough* [1895], 2 Ch. 537.

It may be added that the word "apportionment" has often been used both by the Legislature and by judges, in a wide sense, as synonymous either with a division of benefits amongst different persons entitled to receive them (as in the case, for instance, of money awarded for salvage, *q.v.*), or with an allocation of burdens amongst different persons liable to bear them (as in the case, for instance, of paving expenses under the Public Health Act). In this application, however, it requires no special notice in an explanation of the uses of the word in its strictly legal sense.

Appraisement.—(See, for general law, VALUATION).—This term, in Admiralty law, means the valuation of a ship or her cargo by order of the Admiralty Division of the High Court. A ship's value may be ascertained either by appraisement or agreement; when there is any dispute as to the value, appraisement is the proper course (*The Charlotte Wylie*, 1846, 5 N. C. 6). It is generally only resorted to in salvage actions and proceedings by default, where the ship has been arrested, but may be in any case where there is a dispute as to the value of the property which its owner desires to release on giving bail (*Pritchard, Digest*, 1671); or in actions of restraint, where it may be required in order to determine the value of the shares of the minority of the owners (*The Robert Dickinson*, 1884, 10 P. D. 15). The method of obtaining ap-

praisement is by order from the Court, which may make the order though the ship is foreign (*The Hercules*, 1885, 11 P. D. 10); after which a commission of appraisement will be issued from the Admiralty Registry. Where it is necessary to have the cargo unladen in order to have the property appraised, a commission of unlivery should be also applied for (Williams and Bruce, 308). The procedure under the commission consists in the Admiralty marshal or his substitute making an inventory of the property, getting a qualified person to appraise it on oath, and in writing, making a written certificate of what has been done, and returning these three documents with the commission into the registry (*ibid.* 309). The effect of an appraisement made by the order of the Court is to bind the parties interested, and the owner cannot afterwards have its value determined by sale of the property (*The R. M. Mills*, 1860, 1 Mar. L. C. 5). An appraisement may be set aside on motion by a party aggrieved (see AGGRIEVED) by it, if not properly made, and a second appraisement ordered (*The Oscar*, 1829, 2 Hag. Adm. 258). If no objection be made to it, it is conclusive of the value of the property (*Cargo ex Venus*, 1866, L. R. 1 Ad. & Ec. 50, where cargo arrested for salvage and appraised at £1900 was afterwards sold before hearing the action for £1000 net, but the award was made on the appraised value). Where a ship has been appraised, she cannot, in the first instance, be sold by the marshal for less than her appraised value, and such sale must be by public auction, unless all parties interested consent to a private sale for not less than the appraised value (*The Planet*, 1883, 5 Asp. 144). The costs of an appraisement, if it be necessary, are costs in the action; but if it has been insisted upon by a party without just cause, he bears the costs (Williams and Bruce, 310).

Apprentice.—An apprentice is a person (male or female, adult or infant) who voluntarily binds himself for a definite term to serve and learn from a master, who covenants to teach him his trade or calling. No particular description of instrument or form of words is requisite to create a contract of apprenticeship between the contracting parties, but a "writing" is necessary if the binding is for a longer term than a year. Any agreement between a master and apprentice, whereby the latter agrees to *serve* for any stated term, and the former agrees to *teach*, would amount to a contract of apprenticeship, the consideration being the covenant on the part of the master to teach. Any person capable of making a contract may take an apprentice. An infant may also take an apprentice, but the contract is voidable. Any person of legal capacity can bind himself as an apprentice. Infants, even without their parents' consent, may voluntarily bind themselves upon the general principle, that if an agreement be for the benefit of an infant it shall bind him. But an infant can avoid the indenture the moment he comes of age, as every indenture of an infant is voidable at his election (*Ex parte Davies*, 1784, 5 T. R. 715), but if he wishes to avoid the contract he must do so within a reasonable time after he comes of age; and he can also avoid the indenture whilst under age, if it is clearly for his advantage to do so (*R. v. Gt. Wigston*, 1824, 3 Barn. & Cress. 484). At common law no action can be brought against an infant apprentice on his covenant to serve (*Gylbert v. Fletcher*, 1627, Cro. (3) 179). If an apprentice is placed with a master to learn his business, and that business consists of two or more trades, he will be entitled to receive instruction in all those trades; and if the master gives up any one of them, the apprentice may cease from serving the master, and the latter will be liable on his covenant to teach

(*Ellen v. Topp*, 1851, 6 Ex. Rep. 424, 20 L. J. Ex. 241). An apprentice is not bound to work for his master on Sundays (*Phillips v. Innes*, 1837, 4 Cl. & Fin. 234), but he is on bank holidays. An apprentice cannot be compelled to serve the executors, etc., of his master, unless he so bound himself by the indentures or agreement, but if he is bound to a master, his "executors and administrators," he will be bound to serve them after the master's death (*Cooper v. Simmonds*, 1862, 7 H. & N. 707, 31 L. J. M. C. 138); and where an apprentice binds himself to a firm and their successors he will be bound to serve the latter. Apprentices cannot be enrolled in the volunteer forces without the consent of their masters (*Volunteer Regulations*, 1895, par. 163), and if an apprentice enlist, the master may reclaim him while under age, provided he takes the necessary steps laid down by the Army Act, 1881, s. 96 (44 & 45 Vict. c. 58).

The stamp duty on indentures of apprenticeship is 2s. 6d., whether a premium is paid or not (53 Vict. c. 8, s. 19), but the indentures of parish apprentices and apprentices to the sea services are exempt from duty (33 & 34 Vict. c. 97; and 57 & 58 Vict. c. 60, s. 108). Instruments of apprenticeship must be stamped and the full consideration truly set out in them, and, if it be not fully set forth, the instrument will be null and void (33 & 34 Vict. c. 97, s. 40). The instrument must be stamped before execution. A master need not execute the indentures of apprenticeship, but adult apprentices must execute them, and so must infants (*R. v. Arnesby*, 1820, 3 Barn. & Ald. 584), but they may have their names affixed to the indenture by an agent. Corporations and companies may execute indentures of apprenticeship by affixing their seal to them.

The age of persons binding themselves apprentices is immaterial, so that they be not under seven years of age (see *R. v. Saltern*, 1784, 1 Bott. P. L. Cas. 613). But "parish" apprentices, apprentices to chimney-sweeps, and to the sea service, cannot be bound under the ages of nine, sixteen, and twelve respectively (3 & 4 Vict. c. 85, s. 3; 56 Geo. III. c. 139, s. 7; 57 & 58 Vict. c. 60, s. 106); and where a statute prohibits the taking of an apprentice under a certain age, and a child under that age is notwithstanding taken as such, the binding will be void (*R. v. Hipswell*, 1828, 8 Barn. & Cress. 466, 2 Man. & R. 474). Parents cannot bind their infant sons, or daughters, apprentices without their assent. A master must teach his apprentice all the branches of his trade, but he may depute the teaching to properly qualified workmen. The master is entitled to the custody of the indentures until the end of the term, when they should be cancelled and given up to the apprentice. A master has no common-law right to dismiss his apprentice for ordinary misconduct (*Winstone v. Linn*, 1823, 1 B. & C. 460, 25 R. R. 456; *Phillips v. Clift*, 1859, 28 L. J. N. S. 153; 4 H. & N. 168). He can only do so where the contract in express terms gives him the power to dismiss him (*Westwick v. Theodor*, 1875, L. R. 10 Q. B. 224, 44 L. J. Q. B. 110), but a master may dismiss an apprentice who is an "habitual thief" (*Learoyd v. Brooks* [1891], 1 Q. B. 431). A master cannot assign the indentures without the apprentice's consent, even if he assign his business.

A master must pay to the apprentice the wages he has covenanted that he shall receive, and cannot deduct anything for the days the apprentice may be absent from his work owing to illness, accidents, etc., except it is so provided in the indenture. Neither can he deduct anything out of the wages for loss of time, either wilful or accidental, or where, owing to some statutory enactment, such as the Factory Acts, he is prevented from working, nor for breakages or such-like faults. A master may have any number of apprentices. If an apprentice die during the term of the apprenticeship,

the parent will not be entitled to a return of any part of the premium paid, except there is a special agreement to that effect. A master may administer corporal punishment to his apprentice for negligence or other misbehaviour, provided it be done with moderation; but he must exercise this authority himself; he cannot delegate it to another. If a master uses excessive violence or cruelty towards his apprentice, he will be liable to fine or imprisonment (24 & 25 Vict. c. 100, s. 26). A contract of apprenticeship may be dissolved or determined—(1) by effluxion of time, or by the apprentice coming of age; (2) by bankruptcy of the master (but this does not dissolve the contract of apprenticeship, unless so stipulated in the instrument, and on the bankruptcy of the master the apprentice can avail himself of the provisions of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 41, ss. 1 and 2); (3) by death; (4) by consent; (5) by misconduct (in certain cases). The master, during the term of the apprenticeship, has an absolute and exclusive right to the services of his apprentice, and is entitled to all his earnings.

Summary jurisdiction over apprentices is limited, by the Employers' and Workmen's Act, 1875, 38 & 39 Vict. c. 90, to those upon whose binding either no premium is paid, or the premium paid does not exceed £25, to apprentices bound under the provisions of the Acts relating to the relief of the poor, and to apprentices to the sea service (43 & 44 Vict. c. 16, s. 11). A court of summary jurisdiction, under the powers conferred by this Act, is enabled to entertain all kinds of "disputes" between masters and apprentices, and to make orders for the payment of wages; to set-off and adjust "claims"; to order payment of compensation for absents; to rescind the contract where it is disadvantageous, or where there is incapacity to work, owing to illness or to the nature of the employment; to accept security for the due performance of the contract in lieu of damages; to order the apprentice to perform his duties under the contract; and, where it rescinds the contract, to order the whole or any part of the premium to be returned. It may order an apprentice to be imprisoned for a period not exceeding fourteen days, without hard labour.

Apprentices bound according to the "custom of London" are those who are bound according to the ancient customs of the "City" of London. Any unmarried infant above the age of fourteen and under the age of twenty-one can be so bound to a freeman or freewoman of London, and they must be bound by indenture, and for a period of not less than four years. They are subject to the jurisdiction of the "Chamberlain" of London, who can commit unruly apprentices to Bridewell Prison.

Miscellaneous Points in Criminal Law.—1. Apprentices under sixteen fall within the scope of the Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. c. 41 (*q.v.*).

2. A master is bound at common law to provide his apprentice with proper food, and with proper medical advice during illness, and if his failure to do so leads to the death of the apprentice, is indictable for manslaughter (*R. v. Smith*, 1837, 8 Car. & P. 53; and see *R. v. Self*, 1776, 1 Leach, 137; *R. v. Ridley*, 1811, 2 Camp. 650). Under the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, s. 26, it is a misdemeanour for any person, who is legally liable to provide for an apprentice necessary food, clothing, or lodging, wilfully to refuse or neglect to provide it, or wilfully and maliciously to do or cause to be done any bodily harm to such apprentice, so that the life of the apprentice is endangered, or his health is, or is likely to be, permanently injured. The offence is punishable by penal servitude from three to five years, or imprisonment with or without

hard labour, for not more than two years (24 & 25 Vict. c. 100, s. 26; 54 & 55 Vict. c. 69, s. 1).

3. The Conspiracy and Protection of Property Act, 1878, 38 & 39 Vict. c. 86, s. 6, gives a summary remedy for neglect by a master to provide necessary food, clothing, *medical aid*, or lodging, whereby the health of the apprentice is, or is likely to be, *seriously* or permanently injured.

4. In the case of parish apprentices, the guardians of the poor can recover summarily from the master the expense of maintenance and clothing, when the master has neglected to provide them (32 Geo. III. c. 57, s. 6), or prosecute him for breach of the conditions of the indentures (7 & 8 Vict. c. 101, s. 10); and by s. 73 of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, the guardians may prosecute for offences against parish apprentices, at the cost of the common fund of the union; see also Poor Law Act, 1844, 7 & 8 Vict. c. 101, s. 59.

[Austin, *Law relating to Apprentices*, 1890; Bac. Abr., tit. *Master and Servant*; Com. Dig., tit. *Justice of the Peace*.]

Apprentices (Sea).—The apprenticing of boys to the sea service has been the subject of legislation since 1703, when a statute of Anne (2 & 3 Anne, c. 6) provided that boys chargeable to parishes should be apprenticed by guardians, with the consent of magistrates, to British ships, at the age of ten years until the age of twenty-one, and made it compulsory for shipmasters to take on board a number of them, proportioned to the tonnage of the ship. It also allowed parish boys, who had been bound apprentices under the Poor Law Statute of Elizabeth, 1601, 43 Eliz. c. 2, s. 5, to be assigned and turned over to the sea, their assignment being duly registered. Such apprentices were exempted from impressment till they were eighteen years of age, and voluntary apprentices were exempted for three years from the time of their going to sea. Another Statute in 1705 (4 Anne, c. 19) raised the age for compulsorily received apprentices to thirteen years, and made the exemption from naval service cease in all cases at eighteen years, except in the case of voluntary apprentices who had not been to sea before (5 & 6 Will. IV. c. 19, 1835; and 30 & 31 Vict. c. 59, 1867). These Acts are now repealed, but an Act of 1740 (13 Geo. II. c. 17) continues these exemptions to the present day, exempting all persons under eighteen years of age, and providing that every person who, not having before used the sea, shall bind himself apprentice to serve at sea, shall be freed and exempted from being impressed for the full space of three years from the time of his binding himself apprentice. Apprentices have made good this exemption in several instances their remedy for wrongful impressment being either by suing out their *habeas corpus* (*q.v.*), or by application to the Chief-Justice of the King's Bench for a warrant for their discharge (*The Apprentices Case*, 1779, 1 Leach, 203, Lord Mansfield; *R. v. Edwards*, 1798, 7 T. R. 745, Lord Kenyon). An Act of the present reign (1844, 7 & 8 Vict. c. 112, s. 37), repealing the Act of 1835 which repealed the first Statute of Anne above given, continued the compulsory employment of apprentices at sea in proportion to the tonnage of ships; but this was finally put an end to in 1849 (12 & 13 Vict. c. 29). Settlement for poor law purposes by apprenticeship to sea service was abolished in 1834 (4 & 5 Will. IV. c. 76, s. 67).

The position of sea apprentices is now chiefly governed by the Merchant Shipping Act, 1894. By this Act, mercantile marine superintendents are to assist and facilitate the making of apprenticeships (ss. 105 and 247).

Apprenticeships of poor boys by boards of guardians, or persons exercising their powers, are to be made in the same manner and subject to the same laws and regulations as other apprenticeships made by them (s. 106); and every indenture of such apprenticeships is to be executed by the boy and the person to whom he is bound, in the presence of and attested by two justices of the peace, who are to ascertain that the boy is twelve years of age and of sufficient health and strength, and that the person to whom he is bound is a proper person for the purpose (s. 107). Every indenture of apprenticeship to the sea service is to be executed in duplicate and to be exempt from stamp duty, one indenture being kept and recorded by the proper shipping officer, and the other being indorsed by him with the fact of its having been recorded and then re-delivered to the master of the apprentice; and the master is to notify to the shipping officer any assignment or cancellation of the indenture, or the death or desertion of the apprentice (s. 108). In the case of a foreign-going ship, the master must make any apprentice who is to go to sea with him appear before the superintendent before whom the crew are engaged, and must produce to him the indenture and any assignment of it; and the name of the apprentice, with the date of the indenture and its assignments, if any, and the names of the ports at which they have been registered, are to be entered on the agreement with the crew (s. 109). Only persons licensed by the Board of Trade, or owners, masters, or mates of ships, or regular servants of the shipowner, or superintendents, may engage or supply apprentices (or seamen), and the fees specified by the Act are the only remuneration allowed for so doing (ss. 111, 112). These statutory provisions do not apply to the case of ships belonging to the three general lighthouse authorities, or pleasure yachts (s. 262), nor to any fishing boats, whether exclusively or not employed on the coasts of the United Kingdom (s. 263 (2)). The provisions of the Employers' Liability Act, 1875, 38 & 39 Vict. c. 90, have been applied to seamen and apprentices to the sea service since 1880 (43 & 44 Vict. c. 16, s. 11).

Apprentices are not "seamen" within the meaning of the M. S. A., 1894 (s. 742), but they are subject to the same discipline and liabilities, and enjoy the same rights and protection as regards their wages, property, and service (see generally, Part II. of the Act, and SEAMEN). Like them, they can sue the ship *in rem* for their wages, and perhaps also for the penalty expressed in the indenture of apprenticeship, though they could not before the Judicature Act (*The Albert Crosby*, 1860, Lush. 44). Any Court which takes cognisance of any dispute between master and apprentice may rescind the indenture if it seem unjust (s. 168); and there is an implied obligation in every instrument of apprenticeship that the shipowner will use all reasonable means to secure the seaworthiness of the ship (s. 458). There are also apprentices to the *sea-fishing* service, who, like sea apprentices, were at one time exempted from impressment (1810, 50 Geo. III. c. 108, s. 2), but are not so now (1868, 31 & 32 Vict. c. 45, sched.). Their position is now defined by the M. S. A., 1894, which applies the following provisions to fishing boats of 25 tons tonnage and upwards (this, it is presumed, means that only such boats can carry apprentices). No boy under thirteen years of age can enter into an indenture of apprenticeship or agreement with respect to the sea-fishing service; no boy under sixteen years is to be taken to sea in that service unless he is bound by an indenture or agreement made as the Act directs (the form is given by Order in Council of 12th Dec. 1894, Scrutton, M. S. A., Appendix xiii.), and in the latter case he is called a sea-fishing boy. No board of

guardians is to allow an apprenticeship to be entered into except in conformity with the Act; but a boy under sixteen may be employed in a fishing boat, if he is not obliged to remain in that employment longer than one day, and no written agreement has been made with him. Mercantile marine superintendents are to assist the making of such apprenticeships and agreements, which are to be made before a superintendent, who is to be satisfied that they are in accordance with the Act, that the master is a fit person for the purpose, that the boy is not under thirteen, and is of sufficient health and strength, and that his nearest relatives or guardian, if any, agree, and is then to indorse the indenture to that effect. Such indentures and agreements are to be executed in triplicate, one of which is to be kept by the master, one by the boy, and another by the superintendent. The superintendent or his successor may enforce the indenture or agreement on behalf of the boy against the master, and no money is to be taken from either party for the making of such apprenticeships and agreements (ss. 392-398). Another class of sea apprentices are *pilot apprentices*, who are subject to the bye-laws and regulations of the pilotage authorities (M. S. A., 1894, s. 582). Fishing apprentices stand generally in the same position as seamen in fishing boats as regards discipline and wages (ss. 376-391). See FISHERIES.

[Maude and Pollock, *Merchant Shipping*, i. p. 165 ff.]

Apprenticeship.—See APPRENTICE.

Appropriation of Payments.—A debtor may owe a creditor various sums of money for debts contracted at different dates, and secured in different ways (*e.g.*, by mortgage, bond, covenant, or bill of exchange); on some of these he may be only a joint debtor; on others he may have a surety liable on his default. In any such case the debtor, on making a payment to the creditor, has the right of determining how his money shall be applied; he may appropriate the payment to cancelling whichever debt he pleases. He may say, "I wish with this money to pay off the debt for which A. is my surety"; and though the creditor would much prefer that some other debt for which he has only the debtor's own security should be paid off first, he cannot prevent the debtor's right to apply the payment to that particular demand. But the debtor must notify his intention before or at the time of payment (*Mayfield v. Wadsley*, 1824, 3 Barn. & Cress., at p. 362); though such notification need not be express: it will be sufficient if the intention of the debtor can be inferred from his conduct, or is clearly indicated by any other circumstances (*Newmarch v. Clay*, 1811, 14 East, 238, 243). If, however, the money be paid *generally* (*i.e.* without any specific appropriation by the debtor), the creditor may apply it to any debt he pleases, even to one barred by the Statute of Limitations (see LIMITATION) (*Mills v. Fowkes*, 1839, 5 Bing. N. C. 455); or to one purely equitable, provided it be of agreed and ascertained amount (*Bosanquet v. Wray*, 1816, 6 Taun. 597; 16 R. R. 677; *Goddard v. Hodges*, 1832, 1 Cr. & M. 33); or to a debt contracted by the debtor's wife *dum sola* (*Goddard v. Cox*, 1743, 2 Stra. 1194). The creditor need not apply the money to any particular debt on receiving it; he may do so any time before the jury are sworn (*Grigg v. Cocks*, 1831, 4 Sim. 438). And when he has once so appropriated it, still if he has done this merely by a private entry in his own books, not communicated to the debtor, he

can afterwards change his mind, and apply the payment to satisfy some other debt (*Simson v. Ingham*, 1823, 2 Barn. & Cress. 65). The creditor will generally appropriate the money to discharge the oldest unsecured simple contract debt for which the debtor alone is liable; and the law will not, in favour of a surety, direct the application of money, paid generally, to the discharge of the secured debt, without some circumstances to show that it was so intended (*Plomer v. Long*, 1816, 1 Stark. N. P. 153; *Williams v. Rawlinson*, 1825, 3 Bing. 71; *Henniker v. Wigg*, 1843, 4 Q. B. 792). Such cases as *Marryatts v. White*, 1817, 2 Stark. N. P. 101, and *Kinnaird v. Webster*, 1878, 10 Ch. D. 139, are practically overruled on this point by *City Discount Co. v. McLean*, 1874, L. R. 9 C. P. 692, 9; *Browning v. Baldwin*, 1879, 40 L. T. 248; 27 W. R. 644; and *In re Sherry*, 1884, 25 Ch. D. 692). Thus the surety on a promissory-note, given to secure a loan to a member of a money club, cannot rely upon the monthly subscriptions and premiums paid by his principal, as payments in reduction of his liability upon the note (*Wright v. Hickling*, 1866, L. R. 2 C. P. 199). But a creditor may not appropriate the payment to an illegal debt, if there be also a legal one unpaid (*Wright v. Laing*, 1824, 3 Barn. & Cress. 165).

If neither debtor nor creditor appropriate the money paid to a particular debt, the law will apply the payment to the discharge of the debt of earliest date standing unpaid at the date of the payment, unless there are circumstances to show that such could not have been the intention of the parties (*Hooper v. Keay & Draper*, 1875, 1 Q. B. D. 178). See BANK.

Appropriation of Supplies.—It has long been the established rule for Parliament, in granting supplies, to appropriate them to specific purposes. The practice was introduced as early as the reign of Edward III., with the object of securing that the subsidies voted were in fact applied to the purposes intended by Parliament; the rule was also occasionally observed in the two immediately succeeding reigns, but it was not till after the Restoration that it became common, and not till after the Revolution that it became the invariable usage. With the exception of those items of the national expenditure which constitute the fixed charges on the Consolidated Fund, no payments of public money can lawfully be made until sanctioned by votes of the House of Commons, subsequently embodied in an Act of Parliament called the Appropriation Act, which, besides authorising the issue out of the Consolidated Fund of the necessary amount, appropriates the same, in the manner agreed upon in committee of supply, to the various services (the army, navy, civil service, etc.). To some extent, however, the appropriation is anticipated, for, as the Appropriation Act is not passed till the end of the session, when the financial arrangements for the year have been completed, and as it is necessary to make provision for current expenditure, two Acts, called Consolidated Fund Acts, are usually passed earlier in the session, authorising the issue of certain sums on account; but these Acts are subsequently incorporated in the Appropriation Act, which specifies and appropriates the whole amounts granted throughout the year. The form of the appropriating clause now in use is as follows:—
 “All sums granted by this Act and the other Acts mentioned in Schedule (A) annexed to this Act [being the Consolidated Fund Acts referred to above] out of the said Consolidated Fund towards making good the supply granted to Her Majesty . . . are appropriated and shall be deemed to have been appropriated as from the date of the first of the Acts mentioned in the said Schedule (A) for the services and purposes expressed in Schedule (B) annexed

hereto." Till 1870 it was also customary to insert in each Appropriation Act a clause forbidding the application of moneys which had been voted to any use other than those specifically mentioned in the Act, but since that year this clause has been omitted, as it added nothing to the positive obligation on the executive to apply the sums voted to the particular purposes stated.

The necessity for thus annually voting, and by the Appropriation Act appropriating, the supplies granted by the House of Commons is one of the causes—the other being the passing of the Army Act—that render a yearly sitting of Parliament imperative. "The prorogation or dissolution of Parliament without an Appropriation Act is a constitutional irregularity, as thereby all the grants of the Commons are nullified, and the sums must be voted again in the next session before a legal appropriation can be effected" (May, *Parliamentary Practice*, 10th ed., 521).

The officer ultimately charged with the duty of seeing that the specific appropriations are effected is the Comptroller and Auditor-General.

[See Stubbs, *Constit. Hist.* (1875 ed.) vol. ii. 565; Hallam, *Constit. Hist.* (3rd ed.) vol. ii. 482–3, vol. iii. 158–160; Todd, *Parly. Govt. in England* (ed. by Walpole, 1892) vol. ii. 229–234; Anson, *Law and Custom of the Constitution* (2nd ed.), part i. 260–2, part ii. 338–343; May, *Parly. Prac.* (10th ed.) 519–521, 560–3.]

Appropriation of Water.—The effect of appropriating water flowing in a natural stream, with relation to the person taking it for use and other riparian proprietors, has been regarded differently in bygone times from the way in which it is regarded now. It used to be considered that flowing water was the property of no one, and that nobody had a right to complain if any owner of land adjoining a stream appropriated it for his own exclusive use, unless he was in some way using it at the time, and thus sustained damage from the act of his neighbour; and that by an act of appropriation any landowner might acquire water rights against all other riparian owners, which would continue until he abandoned his user (see *Williams v. Moreland*, 1824, 2 Barn. & Cress. 910). In process of time this theory was modified, and now it is considered that, independently of appropriation and user, all riparian owners have, from the mere fact of being riparian owners, certain rights in natural streams *ex jure naturæ*, and that they can maintain an action for any infringement of those rights (see *Mason v. Hill*, 1833, 5 Barn. & Adol. 1). In *Cocker v. Cowper*, 1834, 5 Tyrw. 103, Parke, B., is reported to have said that the doctrine of appropriation had been much cut down in *Mason v. Hill*, *supra*; and in *Hoker v. Porritt*, 1875, L. R. 10 Ex. 59, it is shown that, though appropriation of water of streams for use does not create any new rights, it will have the effect of increasing the damages recoverable for obstruction, as, in the absence of user, damages could only be nominal.

Water can be appropriated for use, not only as it flows along a surface stream, but also by collecting it in a well or other receptacle, and thus by taking actual possession of it. Water appropriated in this way does not become the property of the collector, and, if it is made to escape, he cannot sue for recovery of his property, for it has ceased to be his, though he may possibly have an action for damages in some other form; and if water naturally percolates through the soil to a well, in unknown and undefined streams, the fact of appropriation by this means does not give the owner of the well any cause of action against another person who, by mining or

sinking another well, cuts off the spring or drains away the water (*Chasemore v. Richards*, 1859, 7 H. L. 349; *Acton v. Blundell*, 1843, 12 Mee. & W. 324.)

Approval, Sales on.—See SALE.

Approvement is where there exists a right of common on the lord's waste, and the lord encloses part of such waste for himself, leaving sufficient common with ingress and egress for the commoners (see COMMON; Williams on *Rights of Common*).

Approver (*Probator*).—An accomplice in treason or felony, who, on arraignment, confessed the fact before plea pleaded, took an oath to reveal all treasons and felonies he knew, and appealed or accused others, in order to obtain pardon (3 Co. Inst. 129; 3 Russ. on *Crimes*, 6th ed., 642; Hawk. P. C., bk. ii. c. 24). No person could be an approver who was attainted or incapable of taking an oath or unable to wage battle (see Pollock and Maitland, *Hist. Eng. Law*, 631). Approvement has long fallen into disuse (2 Hale, P. C., 226), but the term "approver" is still used in Ireland of accomplices who turn Queen's evidence. See ACCOMPLICE.

Apt Words.—English law does not, as do some other systems, attach particular meanings or operation to certain technical words exclusively, so that no words of equivalent meaning, or periphrasis, can be used with the same effect. It looks at the meaning and sense of the words used, and the intention of the parties as indicated by the words, and not the actual words themselves (see Preston's *Conveyancing*, i. p. 182). But the use, especially in conveyancing, of common forms, phrases, and words is eminently advisable; they have a well settled effect, and have, in many instances, been often construed by the Courts. The only important exceptions to the general rule are in regard to (1) words of limitation, (2) words which, in the absence of anything in the deed or agreement in which they are used to the contrary, imply certain covenants, and (3) certain words of art necessarily used in indictments.

1. An estate of inheritance could formerly be limited to an individual only by the use of the word "heirs," or "heirs of the body," or to a corporation sole by the use of the word "successors" (see Elphinstone on the *Interpretation of Deeds*, some unimportant exceptions are there collected), but the Conveyancing Act, 1881, s. 51, permits the use of the words "in fee-simple" or "in tail." The same Act (s. 49) declares that the word "grant" need not necessarily be used in order to convey tenements or hereditaments, corporeal or incorporeal, and this appears to have been the law since the Real Property Act, 1845, 8 & 9 Vict. c. 106. (See the note to s. 49 in Hood & Challis's *Conveyancing Acts*.)

2. At the common law, the use of the words "give" or "grant" (*concessi*) in a deed implied a warranty of title, but this implication was removed by the Real Property Act of 1845, s. 4. In conveyances by the promoters of an undertaking, under the Lands Clauses Act, 1845, s. 132, the use of the word "grant" still implies covenants for title. The words "demise" or "grant" in a lease, if the lease contains no express covenant for title, imply a covenant

for quiet enjoyment, limited to the term of the lessee's own estate (*Sheppard's Touchstone*, p. 165; *Baynes v. Lloyd* [1895], 2 Q. B. 610). It has been held in some cases that any equivalent words of letting, and the use of these words, or of "demise," in a letting without any deed, will have the same implication, but these cases appear to be of doubtful authority. (See *Baynes v. Lloyd*; *supra*, where they are cited and discussed.) As to covenants implied in conveyances, mortgages, and settlements, by parties conveying as "beneficial owner," "settlor," "trustee" or "mortgagee," see the Conveyancing Act, 1881, s. 7, and COVENANT.

3. In an indictment for felony the word "feloniously," and in indictments for "murder," "murder," for burglary, "burglariously," and for rape, "ravish and carnally know" (*R. v. Warren*, 1820, 1 Russ. & R. 46), must be used. The words "felony," "murder," and "burglary" are words of art for which no equivalent expressions are permitted (*per* Parke, B., in *Holford v. Bailey*, 1848, 13 Q. B. 426; *R. v. Gray*, 1864, 33 L. J. M. C. 78).

Arbitrary Punishment.—Under English law punishments are not imposed at the absolute pleasure of the judge; but he has a limited discretion, except in cases of treason and murder, as to the extent and mode of punishment. Except in the case of certain common-law misdemeanours, the punishment of all offences is now regulated by statute (as to felonies, see 7 & 8 Geo. IV. c. 28, s. 1). In the absence of a statutory limit a common-law misdemeanour is punishable by fine (and) or imprisonment, without hard labour for any time, at the judge's discretion, (and) or theoretically whipping, which is, however, never imposed, except under statutory authority (see Stephen, *Hist. Crim. Law*, i. 490; *re Forbes*, 1887, 8 N. S. W. Rep. Law, 68; *R. v. Castro*, 1880, 5 Q. B. D. 490, *per* Bramwell, L. J., at 509). By the Bill of Rights, 1688, 1 Will. & Mary, sess. 2, c. 2, it is declared that excessive bail (see BAIL) ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted. As to fines and punishments, this merely affirms unrepealed earlier Acts (Stat. Westm. First, 1275, 3 Edw. I. c. 6; Magna Charta, 1297, 25 Edw. I. c. 14; the Quarter Sessions Act of 1360, 30 Edw. I. c. 1; and the Petition of Right, 1627, 3 Chas. I. c. 1, s. 3). It was aimed at the severities practised by the Stuart kings, and is read as prohibiting resort to modes of punishment involving torture or recourse to black letter authorities. Where the punishment imposed is authorised by law, improper exercise of his discretion by the judge is remediable only by petition to the Crown through the Home Office for remission. If it is illegal, *and wholly without jurisdiction*, the judgment can be quashed by writ of error or *habeas corpus* with *certiorari*; and the judge is liable to action or indictment (*Anderson v. Gorrie* [1895], 1 Q. B. 668).

[As to the history of punishment in English law, see Pollock and Maitland, *Hist. Eng. Law*, ii. 449–520; Pike, *History of Crime*, *passim*; Stephen, *Hist. Crim. Law*, i. 457–492; *Picton's case*, 1804–1812, 30 St. Tri. 225–883.]

Arbitrary Refusal.—See LANDLORD AND TENANT.

Arbitration.—Arbitration is the settlement of disputes by the decision, not of a regular and ordinary Court of law, but of one or more

persons, who are called arbitrators. The English law relating to this subject is now contained in the Arbitration Act, 1889, 52 & 53 Vict. c. 49. This Statute is an express code, and its application to arbitrations under previous Acts is only excluded where its provisions are absolutely inconsistent with such Acts (see *In re Knight & Tabernacle Permanent Building Society* [1891], 2 Q. B. 63). It is also an amending and not a mere consolidating Act (see *Hurlbatt v. Barnett* [1893], 1 Q. B. 77). The Arbitration Act, 1889, consists of two parts: (1) references by consent out of Court; (2) references by order of Court.

1. *REFERENCES BY CONSENT OUT OF COURT.*—*The Agreement.*—An agreement to determine disputes by arbitration is styled a “submission,” and a submission to arbitration is defined by the Act of 1889 as “a written agreement to submit present or future differences to arbitration, whether to an arbitrator named therein or not.” A submission to arbitration may be verbal. But, if it is so, it does not come within the Act of 1889; and has, moreover, several other disadvantages. Its terms are open to dispute. It cannot be made a rule of Court so as to be enforced like a judgment. And in certain cases it would be ineffectual. For instance, if A. and B. agree verbally to refer to C. the question whether A.’s interest in certain land has determined, this submission would be voidable under sec. 4 of the Statute of Frauds.

A submission may be made by an agreement in writing, not under seal. Here a sixpenny stamp is necessary, except where the matter in dispute does not exceed £5 (see Stamp Act, 1891, 54 & 55 Vict. c. 39, 1st sched.). The agreement need not necessarily be signed by both parties (*Baker v. Yorkshire Fire and Life Assurance Co.* [1892], 1 Q. B. 144). The submission may also be by mutual bonds, *i.e.* each party may execute a bond to the other in a certain penalty, subject to the condition of his abiding by and performing the award. Again, each party may execute a bond to the arbitrators. Or lastly, the submission may be by deed containing mutual covenants to stand by the award.

A submission is an agreement to take the decision, and not the advice only, of the person or persons to whom the matter is to be referred. It is also necessary to distinguish an arbitration from a mere valuation. The former decides a difference which has arisen, while the object of the latter is to prevent a dispute from arising. The distinction is of practical importance, because, while the award of an arbitrator can be directly enforced (see *infra*), the decision of a valuer can only form the subject of an independent action (see *In re Carus Wilson & Greene*, 1887, 18 Q. B. D. 7). In that case, on the sale of land, one of the conditions of sale was that the purchaser should pay for the timber on the land at a valuation, and it was provided that each party should appoint a valuer, that the valuers so appointed should, before they proceeded to act, appoint by writing an umpire, and that the two valuers, or, if they disagreed, their umpire, should make the valuation. The two valuers were unable to agree, and the umpire made the valuation. It was held by the Court of Appeal that such valuation was not in the nature of an award on an arbitration, and that, therefore, an application to set it aside must be refused. There is this further distinction between an arbitrator and a valuer, that the former must act judicially and hear parties.

The capacity of parties to enter upon an agreement to go to arbitration is governed by the ordinary rules of law as to contractual capacity. See **CONTRACT**. An agreement to arbitrate made by an infant is not void; but may be repudiated by the infant at his option. An authorised agent, a

solicitor, at least if clothed with general authority to act for his client in legal proceedings (but great caution is necessary; see *James v. Ricknell*, 1889, 20 Q. B. D. 164), counsel (see *Matthews v. Munster*, 1887, 20 Q. B. D. 141), and the committee of a lunatic with the sanction of the Court in Lunacy (see LUNACY), may refer disputes to arbitration. Every civil dispute, present or future, and the question of liability for such personal injuries as are actionable as well as indictable,—for example, assault (see *Elworthy v. Bird*, 1822, 2 Sim. & St. 372), and nuisance (see *Dobson v. Groves*, 1844, 6 Q. B. 637),—could be referred by consent to arbitration. Not so, however, offences of a public nature (see *Keir v. Leeman*, 1844, 6 Q. B. 308); such as perjury (see *R. v. Hardey*, 1850, 14 Q. B. 529). A submission in writing is not at common law irrevocable. Prior to the Arbitration Act, 1889, the law on this subject stood as follows: (1) A submission of existing or future disputes to two or more *named* arbitrators could be revoked by either party at any time before award, unless it contained an agreement that the submission might be made a rule of Court (see *In re Rouse & Meier*, 1871, L. R. 6 C. P. 212; *Deutsche Springstoff Actien Gesellschaft v. Briscoe*, 1887, 20 Q. B. D. 177). (2) A particular submission, containing the rule of Court provision, could at any time, even after award (see *Pownall v. King*, 1801, 6 Ves. 10), be made a rule of Court, and was therefore irrevocable, except by the leave of the Court or a judge (9 Will. III. c. 15, and 3 & 4 Will. IV. 42). (3) An agreement by deed or in writing to refer existing or future differences to arbitrators *not named* might at any time be made a rule of Court, unless a contrary intention appeared in the instrument,—*e.g.*, where the agreement provided that the decision of the arbitrator should be without appeal (see *Wadsworth v. Smith*, 1871, L. R. 6 Q. B. 332),—and was not revocable (*Piercy v. Young*, 1880, 14 Ch. D. 200; *Fraser v. Ehrensperger*, 1883, 12 Q. B. D. 310), and might be enforced under the Common Law Procedure Act, 1854, s. 11. These distinctions, which gave rise to considerable practical difficulty, are got rid of by the Act of 1889, which provides that a submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court (s. 1). A submission may be enforced in various ways. An action may be brought against the party refusing to proceed with the arbitration, for which it provides, and damages may be claimed. Only nominal damages will, however, be generally recoverable, unless in the original contract refusal to arbitrate was made to involve payment of a sum named as liquidated damages. A submission will not be enforced by a decree for specific performance, nor by injunction. But, while a submission cannot very readily be enforced by action, there are indirect means by which the Court can compel parties to carry it out: (1) the submission may be enforced by allowing the arbitrator to proceed *ex parte*, and giving effect to his award when made; or (2) the Court may stay proceedings brought to determine matters which come within the scope of the arbitration.

(1) Where the reference is to a single arbitrator, and difficulty arises in securing the concurrence of any party to his appointment, the appointment may be made by the Court itself. Where the reference is to two arbitrators, the party refusing to appoint will be obliged to accept the appointment made by his opponent (Act of 1889, ss. 5 and 6). The arbitrator so appointed gives notice to the party who has refused to concur in his appointment, and if this notice is of no avail he proceeds to try the case *ex parte*, and to make his award. (2) Under sec. 4 of the Arbitration Act, 1889, if any party to a submission commences any legal proceedings in any Court against

any other party to the submission, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance (*q.v.*) and before delivering any pleadings, or taking any other step in the proceedings, apply to that Court to stay them. A "step in the proceedings" within the section means some application to the Court by summons or motion, and does not include an application from one party to another (*Ives & Barker v. Willans* [1894], 1 Ch. 68; [1894], 2 Ch. 478), or an application by letter for an enlargement of time for putting in a defence (*Brighton Marine Palace and Pier v. Woodhouse* [1893], 2 Ch. 486), or the requiring of the delivery of a statement of claim (*Ives & Barker v. Willans, supra*). But the taking out of a summons for time for delivery of defence is such a "step" (*Bartlett v. Ford's Hotel Co.* [1895], 1 Q. B. 851; [1896], App. Cas. 1), and so is an application for leave to administer interrogatories (*Chappell v. North* [1891], 2 Q. B. 252). In order to induce the Court to make an order staying proceedings under this section the application must be made in time, and the applicant must satisfy the Court that at the time when the proceedings were commenced, he was, and that he still remains, ready and willing to do all things necessary to the proper conduct of the arbitration. The Court must also be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. A stay of proceedings may be refused on such grounds as these, that the validity of the agreement to submit to arbitration is itself in question (see *Kitts v. Moore* [1895], 1 Q. B. 253), or that there is some serious objection to the fitness of the arbitrator, or that the applicant is simply aiming at delay, or that the party who resists is accused of fraud, or that the point in dispute in the proceedings is a question of law not involved in the facts which form the subject of the submission. The Court will generally stay proceedings where a contract contains a clause making arbitration a condition precedent to the right to bring an action. Such clauses are constantly found in policies of insurance, and are expressed in such terms as these: "The party insured shall not be entitled to commence or maintain any action at law, or suit in equity, upon his policy until the amount of the loss shall have been referred and determined, as hereinbefore provided, and then only for the amount so awarded." In the case of *Viney v. Bignold*, 1887, 20 Q. B. D. 172, from which the above clause is taken, the Court held that arbitration must precede an action, and Wills, J., laid down the principles of construction applicable to such clauses in the following terms:—"If there is a covenant to pay the amount of the loss, accompanied by a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant, but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover." In some cases, however, the Court has refused to interfere, leaving the defendant to plead the condition as a defence.

The Arbitrator is a person selected by the mutual consent of the parties to determine a dispute, or matters in controversy between them. As a single arbitrator is selected by the parties themselves, the question of his eligibility for the office is not one of the greatest prominence or importance. It has been said that if parties chose to appoint a lunatic to determine their disputes the appointment would be valid, but this dictum is of more than questionable authority (see *Bryd*, 58). Apart from such an extreme case, however, there is no doubt that the Courts are unwilling to set the appointment of arbitrators aside lightly, where the choice has been made by both

parties with their eyes open. In contracts of works there is commonly a provision, that the engineer (see **ENGINEER**) shall be the arbitrator in any dispute between the contractor and his own employer. The practical effect of this provision is to make the engineer judge in his own cause; but the Courts will not prevent him from acting where the contractor was aware of the facts when he signed the contract, unless it is shown, not merely that he has already formed an opinion on the dispute, but that there is every probability that he will be guilty of some misconduct in the matter of the arbitration, and in short will not act fairly (*Eckersley v. Mersey Docks and Harbour Board* [1894], 2 Q. B. 667; *Ives & Barker v. Willans* [1894], 2 Ch. 478; and *Jackson v. Barry Railway Company* [1893], 1 Ch. 238).

No form is prescribed for the appointment of an arbitrator. The language used should, however, clearly specify (a) his name and description, and (b) the difference or differences which he is to decide. The Arbitration Act, 1889, contains provisions for the appointment of arbitrators when a party declines to nominate an arbitrator, or the arbitrator nominated refuses to act, or becomes incapable of doing so. The machinery varies according as the reference is to a single arbitrator or to two arbitrators.

Reference to a single Arbitrator.—In any of the following cases:—(a) where all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or (b) where an appointed arbitrator refuses to act, or is incapable of acting (see *In re Wilson & Son, v. The Eastern Counties Navigation Co.* [1892], 1 Q. B. 81), or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy, any party may serve the other parties with a written notice to appoint an arbitrator—no particular arbitrator need be named in the notice, (*Eyre v. The Corporation of Leicester* [1892], 1 Q. B. 136). If the appointment is not made within seven clear days (see **CLEAR DAYS**) after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, who has the like power to act in the reference, and make an award as if he had been appointed by consent of all the parties (s. 5).

Reference to two Arbitrators.—Here, where either of the appointed arbitrators refuses to act, the party who appointed him may appoint a new arbitrator in his place. If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party giving such notice may appoint his nominee sole arbitrator in the reference, and his award will be as binding on the parties as if he had been appointed by consent. The Court or a judge may, however, set aside any appointment made in pursuance of this provision (s. 6). *Semble* there is no power to compel the parties to nominate when the submission is to more than two arbitrators (*Smith v. Nelson's Arbitration*, 1890, 25 Q. B. D. 545). Where a party refuses to recognise an arbitrator validly appointed, the arbitrator, unless removed by the Court, will proceed to act *ex parte* (Act of 1889, s. 11).

Duties of Arbitrator.—The duties of an arbitrator are to try the case submitted to him impartially, and to exercise such skill or discretion as he possesses in deciding it correctly. These duties rest equally upon single and upon two or more arbitrators. An arbitrator is not liable to be sued for want of skill or negligence in the conducting of the arbitration (*Pappa v. Rose*, 1872, L. R. 7 C. P. 525). Where, however, he is a party to the sub-

mission, he may incur legal liability by refusing to act (*ibid.* 527). For misconduct, as already stated, he may be removed by the Court.

Remuneration of Arbitrator.—The better opinion appears to be that an arbitrator cannot sue for his fees, unless upon an express promise to pay them (see *Hoggins v. Gordon*, 1843, 3 Q. B. 467. In *re Crampton v. Ridley*, 1887, 20 Q. B. D. 48), however, A. L. Smith, J., expressed a strong view that in a commercial arbitration, at least, there is an implied contract to pay the arbitrators (and umpire) reasonable remuneration for their services. An arbitrator is not, however, without protection in regard to his fees. He may retain the award till his fees are paid; and it seems that an arbitrator, on refusing to give up an award, except upon payment of an extortionate fee, cannot be attached for contempt. The proper course for the party from whom such a fee is demanded, is either to pay it and sue the arbitrator for money had and received (*Dosset v. Gingell*, 1841, 2 Man. & G. 872), or to apply to the Court to set the award aside, on the ground that the charges are so excessive as to amount to misconduct on the part of the arbitrator (see *infra*). The lien of an arbitrator covers the award, the submission, and any documents containing information which he himself has procured, or caused to be procured, but not papers put in evidence by the parties. In the course of the reference an arbitrator may himself fix the amount of his remuneration and costs, if the submission does not otherwise provide, and if the amount is named in and as part of the award (*In re Stephens & Co. v. Liverpool and Globe Insurance Co.*, 1892, 36 Sol. J. 464; and see Act of 1889, sched. 1, subs. (i.)). Where, however, the amount is not specified in the award, but is contained, *e.g.*, in a separate notice given to the parties, the Master must tax the costs and remuneration (*In re Prebble v. Robinson* [1892], 2 Q. B. 602), and, even where the amount of the costs and remuneration is stated in the award, the Court may, as above stated, set the award aside, if the charges are so excessive as to constitute misconduct on the part of the arbitrator.

Authority of Arbitrator.—As to what matters may be referred to arbitration, see *ante*. The authority of an arbitrator largely depends on the terms of the submission, and the question whether matters in dispute are within the reference is one for the Court to determine (*Piercy v. Young*, 1880, 14 Ch. D. 200), unless the parties have agreed to leave it to the arbitrator himself. Under a reference of (*a*) *pendente lite*, "all matters in the cause," the authority of an arbitrator would be limited to the points in dispute between the parties in that litigation; (*b*) "all matters of difference," the award might cover all disputes between the parties down to the time of the submission, and even of the award. In the absence, however, of express or implied authority, an arbitrator cannot adjudicate on claims which have not arisen at the time when the award is made (see *Barnardiston v. Fowler*, 10 Mod. Ca. 204). In *Piercy v. Young*, *supra*, it was held that an arbitration clause in articles of partnership, that "any differences or disputes which may arise between the partners shall be settled by an arbitration," did not cover a dispute as to whether a purchase of certain property was made on behalf of the firm, the *ratio decidendi* being, that as the matter in controversy was, whether a partnership existed with reference to the property in question, the dispute was not one arising "between the partners." In *Turnell v. Sanderson*, 1891, 60 L. J. Ch. 703, one partner commenced an action for dissolution, on the alleged ground that the business could not be carried on except at a loss. The partnership deed provided for the reference to two arbitrators, of any difference arising between the partners in regard to the construction

of the articles, "or to any division, act, or thing, to be made or done in pursuance thereof, or to any matter or thing relating to the said partnership or the affairs thereof." Kekewich, J., held that the question whether, under the circumstances, there should be a dissolution, was outside the authority of an arbitrator appointed under the clause, and refused to stay the action. And see *Joplin v. Postlethwaite*, 1890, 61 L. T. 629. *Semble*, however, a reference of "all matters in difference" would include power to award a dissolution (Lindley, *Partnership*, p. 456).

As to the cases in which an arbitrator may be called as a witness, see *infra*, *Setting aside Award*.

An Umpire.—If a reference is to two or more arbitrators, it is inferred in the submission, unless the contrary is stated, that they may appoint an umpire at any time within the period during which they may make an award (Act of 1889, sched. i. (b)), and if the arbitrators have allowed their time for making an award to expire, or have delivered to any party to the submission, or to the umpire, a notice that they cannot agree, the umpire may forthwith enter upon the reference in lieu of the arbitrators (*ibid.* sched. i. (d)). Where the arbitrators do not appoint an umpire, or where the umpire selected cannot or will not act, the Court makes the appointment if, after notice by one party, the other refuses to concur in appointing an umpire. The umpire may be appointed in time to sit with the arbitrators, and hear the evidence, and thus save the parties time and expense in the event of a disagreement between the arbitrators. But he cannot take any part in the proceedings till the arbitrators disagree. An umpire, after having entered upon his duties, is, *mutatis mutandis*, in the same position, as to both rights and obligations, as an arbitrator.

Procedure on an Arbitration.—As regards all matters of procedure, the course of an arbitration is similar to that of an ordinary trial at law. The rules of evidence must be observed. Any party who thinks that an arbitrator has wrongly admitted, or rejected, evidence may move the Court to revoke the submission (*East and West India Docks v. Kirk & Randall*, 1887, 12 App. Cas. 738), or apply to the arbitrator (or, if he refuses, to the Court, for an order compelling him) to state a special case. The attendance of witnesses and the production of documents at an arbitration can be enforced on subpoena (Act of 1889, ss. 8 and 18). The evidence may, at the arbitrator's discretion, be taken on oath (*q.v.*) or affirmation (*q.v.*), unless the submission provides to the contrary (s. 7 (a) and sched. i. (g)), and persons wilfully giving false evidence before an arbitrator are guilty of perjury (*q.v.*). The preparation of false evidence, to be used in an arbitration, is an indictable misdemeanour at common law, even although the arbitration does not, in fact, take place (*R. v. Vreones* [1891], 1 Q. B. 360). If a point of law arises, the arbitrator may himself decide it, or state a case for the opinion of the Court (Act of 1889, s. 19), or put his award, or any part of it, in the form of a special case (s. 7 (b)). Either party may move the Court to compel an arbitrator to state a special case (s. 19). An arbitrator sometimes has a legal assessor to sit with him and advise him as to points of law. But he is not entitled to such assistance if the parties object (*Proctor v. Williamson*, 1860, 29 L. J. C. P. 157), and in any event—as in the case of a judge sitting with assessors (see *Assessors*)—the decision must be his own. An arbitrator should not as a rule proceed *ex parte*. To this rule, however, there are several exceptions. Where any party, after receiving due notice of the date and place fixed for the hearing of the arbitration refuses to attend, the arbitrator should give him peremptory notice of the next appointment, and may then,

proceed *ex parte* on a second default. A similar course may be taken where any party refuses to recognise the authority of the arbitrator. Where there are two arbitrators, each should be present at the hearing, and an umpire, when he is appointed and enters upon the reference, is bound by the rules applicable to arbitrators.

The Award.—No special form is prescribed by the Act of 1889 for an award. The submission itself may contain directions as to the form which the award is to take, and these must be complied with. But, in the absence of such directions, the arbitrator may himself determine the form in which his award is to be cast. Unless the submission otherwise provides, an award must be in writing (Act of 1889, sched. 1). Where the case is referred to the arbitration of three persons, "the award to be that of the said arbitrators or any two of them," it is necessary that they should execute the award together, since, if this requirement is not complied with, something might have occurred at the last moment to change the opinion of one or both of the arbitrators (see *Stalworth v. Innes*, 1845, 14 L. J. Ex. 81, and *Wade v. Dowling*, 1854, 23 L. J. Q. B. 302). Under the Stamp Act, 1891, the following duties are payable on awards in England or Ireland.

In any case in which an amount or value is the matter in dispute—

	£ s. d.	
Where no amount is awarded, or the amount or value awarded does not exceed £5	0	0 3
Where the amount or value awarded—		
Exceeds £5 and does not exceed £10	0	0 6
" 10 " " 20	0	1 0
" 20 " " 30	0	1 6
" 30 " " 40	0	2 0
" 40 " " 50	0	2 6
" 50 " " 100	0	5 0
" 100 " " 200	0	10 0
" 200 " " 500	0	15 0
" 500 " " 750	1	0 0
" 750 " " 1000	1	5 0
" 1000	1	15 0
In any other case,	1	15 0

In the absence of any express provision in regard to the point in the submission, an award under the Arbitration Act, 1889, must be made in writing, within three months after the arbitrators have entered upon the reference, or have been called upon to act by notice in writing from any party to the submission, or on or before any later day to which they, by any writing signed by them, may from time to time enlarge the time for making the award (sched. 1 (c)). Where an award is remitted by the Court to the arbitrator, his fresh award must be made within three months from the order of remittal, unless the Court otherwise orders (s. 10, subs. 2). The Court may also extend the time for making an award, even where the time fixed by the arbitrator has expired (see *Lord v. Lee*, 1843, 3 Q. B. 404; *Denton v. Strong*, 1846, 9 Q. B. 117; *May v. Harcourt*, 1884, 13 Q. B. D. 688; and *In re Dare Valley Railway Co.* [1894], 4 Ch. 554).

Where the time for making an award is enlarged by the Court, the enlargement is deemed to be for one month unless a different time is specified in the order (R. S. C., Order 64, r. 14 (a)). An umpire is required to make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on any later day to which the umpire may by writing, signed by him, enlarge the time. The effect of an award not being made in time depends upon

circumstances. It may be prescribed by the parties themselves in the submission, and, even where the submission contains no express provision upon the point, the parties may waive any objections to the award on the ground that it is out of time, either expressly by a written agreement properly stamped, or impliedly by conduct (see the case of *Darnley v. London, Chatham, and Dover Railway*, 1842, 2 H. L. 43). It is scarcely necessary to observe that in the case of a submission to arbitrators who have appointed an umpire, failure on the part of the arbitrators to make their award gives the umpire jurisdiction, under sec. 23, to enter upon the reference and dispose of the case. An award must be (a) published and delivered, or made in accordance with the terms of the submission; (b) *intra vires* and at the same time a complete disposal of all the points submitted to the arbitrator (see in regard to these matters, *Duke of Buccleuch v. Metropolitan Board of Works*, 1878, L. R. 5 Ex. 221-229; *Harding v. Forshaw*, 1836, 1 Mee. & W. 415; *Samuel v. Cooper* 1835, 2 Ad. & E. 752); (c) final, except as regards matters of mere valuation; (d) certain; (e) possible, consistent, and legal. So long as these provisions are complied with, an arbitrator may make his award in the alternative, affix to it any proper conditions, and give any directions, e.g. as to times and amount of payment, indemnities, releases, and conveyances. He may also, unless the submission expresses a contrary intention, correct in his award clerical mistakes or errors arising from any accidental slip or omission (Act of 1889, s. 7, overruling *Mordue v. Palmer*, 1860, 2 L. T. 752). The costs of the reference and the award are in the discretion of the arbitrators or umpire, who may direct to, and by whom, and in what manner, those costs, or any part thereof, are to be paid, and may tax or settle the amount of costs to be so paid, and award costs to be paid as between solicitor and client. It is stated, in Russell on *Arbitration*, 7th ed., p. 377 (and see authorities there cited), that, in the absence of any provision to the contrary in the submission, an arbitrator has implied power to deal with the costs incurred in an action referred to arbitration before it is so referred.

Setting aside an Award.—An award may be set aside on the following grounds:—

(1) Corrupt or irregular conduct on the part of the arbitrator, e.g. his refusal to postpone a meeting in order to let one party obtain counsel, when the other party has unexpectedly appeared by counsel; his permitting the examination of a party in the absence of the other party unless the irregularity is subsequently waived. In the case of *Gee v. Lomas* (*Times*, 25th July 1887), an arbitrator had made his award *bonâ fide* and on a misunderstanding, without consideration of certain statements which the defendant had at his request been preparing. The award was set aside (see also *In re Corn Trade Association*, L. N. 1888, p. 42). In the case of *Moseley v. Simpson*, 1873, 28 L. T. 727, A. and B., two arbitrators, lunched with C., who was a party to the arbitration, in the absence of D., the other party, during the proceedings. It was not shown that C. had attempted to influence A. and B. unduly. The Court held that, although the conduct of A. and B. had been highly improper, the award should not be set aside. An arbitrator does not necessarily misconduct himself by expressing an opinion on the subject-matter of the reference, before formally entering into it, even though the opinion is expressed in writing and is identical with the terms of the subsequent award (*Hutchinson v. Hayward*, 1867, 15 L. T. 291). Evidence of an admission out of Court that an arbitrator made his award improperly, is not admissible in support of an application to set aside the award. The evidence of the arbitrator himself on the matter should

be before the Court (see *In re Whiteley and Roberts' Arbitration* [1891], 1 Ch. 558).

(2) A mistake on the part of the arbitrator, going to the root of the matter in issue, if the mistake either is admitted by the respondent to the appeal or appears on the face of the award.

(3) Fraudulent concealment of facts by one party, or wilful deception of the arbitrator, unless (see *Tullis v. Jacson* [1892], 3 Ch. 441) the submission contained an agreement that neither party would attempt to set aside the award on the ground of fraud.

(4) Where the award lacks any of the requisites above stated, *e.g.* where it is uncertain, or not final, or *ultra vires*.

An award which is bad in part may be good for the rest, if the good is clearly separable from the bad. Instead of setting an award aside, the Court or a judge may remit it to the arbitrators or umpire for reconsideration. This course may be taken in cases of obvious defect, or omission, or mistake, or (see *In re Keighley & Co. and Durrant & Co.* [1893], 1 Q. B. 405), where new evidence of a material character, which could not have been made available at the time of the reference by the party relying upon it has been discovered after the award was made.

Enforcement of an Award.—An award may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect (Act of 1889, s. 12). An application for leave of this kind is made by summons before a Master in Chambers (see *Annual Practice*, notes to Arbitration Act, 1889, s. 12). The application may be made at any time, even although the time for moving to set aside the award is not yet expired (see R. S. C., Order 42, r. 31 (a)). The party in whose favour the award is made may also sue upon it as upon a judgment or decree, and may, in some cases, obtain a decree for its specific performance. Disobedience to an award where, under the Arbitration Act, 1889, the submission has the effect of a rule of Court, may also be punished by committal for contempt (see CONTEMPT OF COURT). An award cannot be enforced by a stranger, nor is it binding upon him, although, as in the case of ordinary judgments and decrees, he is bound to recognise and respect the state of affairs which it has created between the parties. There is no direct appeal against awards. But, as already indicated, the intervention of the Court may be applied for to remove the arbitrator, or even restrain him from acting, or to revoke the submission, or to set aside or remit the award.

A variety of statutes contain provisions for the arbitration of legal questions arising under them. These will be dealt with under their proper heads. It may suffice to refer here to the Local Government Acts, 1888 and 1894; the Lands Clauses Acts; the Public Health Act, 1875; and the Lunacy Acts, 1890 and 1891.

II. *REFERENCES BY ORDER OF COURT.*—The Court or a judge may refer any question arising, *i.e.* arising necessarily (*Weed v. Ward*, 1889, 40 Ch. D. 555), in any cause or matter, other than a criminal proceeding by the Crown, for inquiry or report to any official or special referee (Act of 1889, s. 13, subs. 1); the report of an official or special referee may be adopted, wholly or partially, by the Court or a judge, and, if so adopted, may be enforced as a judgment or order to the same effect (*ibid.* subs. 2). The Court or a judge may also refer an entire action (a) if all the parties interested, who are not under any disability, consent; or (b) if the cause or matter requires any prolonged examination of documents, or any scientific or local investigation, which cannot conveniently be made before a jury, or conducted by the Court through its other ordinary officers; or (c) if the

question in dispute consists wholly or in part of matters of account. As to the meaning of "prolonged examination of documents," see *Ormerod v. Todmorden*, 1882, 8 Q. B. D. 677; *Green v. Barrett*, 1875, W. N., 1875, 204; and *Hamilton v. The Merchants Marine Insurance Co.*, 1889, 58 L. J. Q. B. 544. As to "scientific or local investigation," see *Saxby v. Gloucester Waggon Co.*, 1880, W. N., 1880, 28. As to "matters of account," see *Knight v. Coles*, 1887, 19 Q. B. D. 302; *Ward v. Pilley*, 1880, 5 Q. B. D. 427; and *Hurlbatt v. Barrett* [1893], 1 Q. B. 77.

In all cases of reference to an official or special referee, the official or special referee is deemed to be an officer of Court, and conducts the reference subject to the rules of Court (Act of 1889, s. 15, subs. 1); and see R. S. C. Order 36, rr. 49, 50, 55*b*, and 55*c*.

The report or award of any official or special referee, unless set aside by the Court or a judge, may be enforced as a verdict of a jury (see *Glasbrook v. Owen*, 1889, 7 T. L. R. 62).

The official referees are salaried officers of the Court (see OFFICIAL REFEREES). The remuneration of special referees is determined by the Court or a judge (Act of 1889, s. 15, subs. 3).

In regard to the references under consideration, all the powers conferred by the Arbitration Act, 1889, on the Court or a judge as to references by consent out of Court apply (Act of 1889, s. 16); and the Court of Appeal has all the powers conferred by the Act of 1889 on the Court or a judge under the provisions relating to references under order of the Court (Act of 1889, s. 17).

See CHAMBERS OF COMMERCE; LONDON CHAMBER OF ARBITRATION; CONCILIATION; EMPLOYERS AND WORKMEN. As to effect of taking part in an arbitration on rights, see ACQUIESCENCE.

Arbitration, in International law, is the reference of disputes between independent States to one or more arbiters chosen by the parties.

This method of avoiding an armed conflict dates back to ancient times, and has never ceased to be resorted to from time to time in cases where the parties did not consider the issue essential enough to warrant an appeal to arms.

During the present century a large increase in the causes of international friction has necessarily resulted from greater facilities of intercourse between nations. This and, on the other hand, the immense stake European Powers have in the preservation of peace, where war means the mobilisation of armed nations, have encouraged a hope among humanitarians that this mode of settlement might be extended to all kinds of difficulties between States. But their idea, and its corollary, a permanent Court of Arbitration, have not as yet obtained a foothold in the Councils of Europe, the so-called precedents of the United States Supreme Court, the Swiss Federal Court, the Mixed Court in Egypt (see EGYPT), and the Supreme Court of the Congo State at Brussels, whatever the extent of their internal jurisdiction or composition, are not international Courts, and therefore not apt precedents. It is not impossible, however, that the recurrence of references to the same authority, say, some such one as the Swiss Federal Court, which has already acted in several cases of international arbitration, might lead indirectly to its having a preponderating share in the settlement of international disputes.

In the course of the present century a hundred or more differences

between States have been decided by arbitration, and the increasing number of such cases in successive years shows it is growing in favour among Governments.

It is no less in favour among international jurists, and one of the first matters dealt with by the INSTITUTE OF INTERNATIONAL LAW (*q.v.*), after its foundation in 1873, was to adopt a *projet de règlement pour la procédure arbitrale internationale* (*annuaire de l'Institut de Droit International*, 1^{ère} année, 1877, p. 126), a model procedure which has since been followed more or less in practice. More recently (1895), the INTERNATIONAL LAW ASSOCIATION, formerly the Association for the Reform and Codification of the Law of Nations (*q.v.*), drew up a scheme of regulations, which deals more fully with the reception of evidence, and is in closer conformity with the practice of Anglo-Saxon Courts of Justice (*Report for 1895*, p. 59).

We have the authority of the present Attorney-General, Sir Richard Webster, Q.C., for saying that it is no longer thought necessary to "advocate the principle of International Arbitration; it is now regarded as so fully recognised by all civilised nations that it has become unnecessary to argue in its support" ("Address delivered by the Attorney-General, in 1895, at the 17th Conference of the Association for the Reform and Codification of the Law of Nations," *Report*, p. 37).

International jurists, however, are generally agreed that arbitration is not adapted for a certain class of conflicts. Thus, M. Rolin-Jacquemyns, the honorary President of the Institute of International Law, excludes from the sphere of arbitration all questions which menace the honour or the existence of States ("Le problème final du droit international," *Revue de droit international*, 1877, p. 161).

Lord Chief-Justice Russell, in the same order of ideas, says, "Men do not arbitrate where character is at stake, nor will any self-respecting nation readily arbitrate on questions touching its national independence or affecting its honour" ("Address at Saratoga to the American Bar Association," August 20, 1896).

Sir R. Webster classed, in the speech above quoted, the typical cases susceptible of arbitration as follows:—

1. Cases of boundary.
2. Cases of damage for an admitted wrongful act.
3. Cases of dispute involving questions of legal right.

M. Rouard de Card subdivides them into cases of boundaries, possession of territory, seizure of vessels or confiscation of cargoes, violent or arbitrary acts against foreigners, rights of navigation, fishery rights, and matters of accounts (*Destinées de l'arbitrage international*, Paris, 1892, p. 208).

But if the sphere of arbitration is to be thus limited, may we not ask with Professor Lorimer, "whether the class of cases which remain to it be not precisely those which have hitherto been disposed of perhaps just as surely and more quietly by diplomacy?" "The percentage of international differences which led to war," observes that author, "was always limited; and if this percentage cannot be limited still further by referring some of them to arbitration, then arbitration becomes merely a method by which diplomatists may ascertain facts, assess damages, and the like" (*Law of Nations*, ii. p. 212).

If, however, diplomacy could have disposed of the matters which have been submitted to arbitration, is it not probable they would have been so disposed of? It is even to be assumed that, though clauses have been

inserted in a number of the more recent treaties of commerce and navigation, providing that difficulties of construction and application shall be submitted to arbitration, such difficulties will only be considered to exist where diplomacy has failed to dispose of them!

The example of certain South and Central American States to provide by treaties of permanent arbitration for the peaceful solution of all kinds of difficulties between them, without any exception, is now being followed by Great Britain and the United States. It is to be hoped that such a treaty will prove more effectual than in the case of their predecessors, as between whom such treaties have not prevented war.

The honour of a State is, of course, pledged to the acceptance and due fulfilment of an award delivered by a tribunal or arbiter duly appointed by the parties to the treaty of submission.

The jurists allow the following cases of repudiation, and no others:—When the Court has exceeded its powers under the treaty of submission; when the award has been procured by fraud, or its meaning is obscure; and where it is absolutely contrary to the acknowledged principles of international law.

The following is a list of arbitrations to which Great Britain has been a party in the course of the present century:—

1. Great Britain and United States (1816). St. Croix River and the Lake Boundaries. Referred to three Commissioners.

2. Great Britain and United States (1822). Restoration of slaves in possession of the British at time of ratification of the Treaty of Ghent. Referred to the Emperor of Russia. Award in favour of United States.

3. Great Britain and United States (1827). Boundary of United States. King of the Netherlands chosen arbitrator. Award given 10th January 1831, not accepted by United States. Matter afterwards settled by compromise in 1842.

4. Great Britain and France (1842). Claims for injuries sustained by British merchants through omission to notify blockade of the Portendic coast of Morocco by France. Referred to the King of Prussia, who gave his award in favour of Great Britain.

5. Great Britain and United States (1853). Value of slaves who captured the ship *Creole*, sailed to a British port, and were there liberated. Award in favour of American claim.

Great Britain and Portugal (1858). Croft affair. Hamburg Senate chosen arbitrator.

Great Britain and Portugal. Shootridge affair. Referred to Senate of Hamburg as arbitrator.

6. Great Britain and Brazil (1863). Imprisonment of British naval officers at Rio de Janeiro. Referred to King of the Belgians, who decided in favour of Brazil.

7. Great Britain and Peru (1864). Referred to Hamburg Senate, who decided that the claim was based upon exaggerated statements.

8. Great Britain and Spain (1867). On seizure by Spain of the ship *Mermaid*.

9. Great Britain and Portugal (1869). Rival claims to the sovereignty over the island of Bulama, on the West Coast of Africa. Referred to President of the United States, who decided in favour of Portugal.

10. Great Britain and United States (1871). *Alabama* affair. Referred to a High Commission, consisting of five members, nominated by United States, Great Britain, Italy, Switzerland, and Brazil. Met at Geneva. Award in favour of the United States. See ALABAMA CASE.

11. Great Britain and United States (1871). Claims arising out of War of Secession. Referred to a Mixed Commission of three members, which adjudged the United States to pay £386,000 to Great Britain.

12. Great Britain and United States (1871). San Juan affair. Referred to Emperor of Germany, who decided in favour of the American claim.

13. Great Britain and United States (1871). Nova Scotia Fisheries. Referred to three Commissioners. Award in favour of Great Britain, American Commissioner dissenting and withdrawing from the arbitration. It was, however, accepted, and the amount voted by Congress.

14. Great Britain and Brazil (1873). Dundonald claims. Referred to United States and Italian Minister at Rio, who decided against Brazilian Government.

15. Great Britain and Portugal (1875). Territories and islands of Delagoa Bay. Referred to Marshal MacMahon, President of the French Republic, who decided in favour of Portugal.

16. Great Britain and Colombia (1875). Pecuniary claims of British firm of merchants against Colombia.

17. Great Britain and Liberia (1879).

18. Great Britain and Nicaragua (1879). Question of sovereignty over Mosquito Indians. Referred to Emperor of Austria. Award in favour of Great Britain.

Great Britain and Chili (1883). Damage incurred by British subjects in war between Chili, Peru, and Bolivia. Referred to mixed commission.

19. Great Britain and Spain (1887). Collision. Referred to the Italian Government.

20. Great Britain and Portugal (1890). Seizure of the Delagoa Bay Railway by Portugal. Referred to three Swiss arbitrators.

21. Great Britain and Germany (1890). Island of Lamu, east coast of Africa. Referred to Baron Lambermont, Belgian Minister of State. Award in favour of Great Britain.

22. Great Britain and France (1891). Newfoundland Fisheries. Referred to a commission of seven, two representatives of each government, and three specialists, namely, Professor de Martens of St. Petersburg, Professor Rivier of Brussels, and M. Gram, Norway.

23. Great Britain and United States (1891). Behring Sea Seal Fisheries. Referred to commission of seven, namely, Baron de Courcel (France); Lord Hannen and Sir John Thompson (Great Britain); Judge John T. Harlan and Senator J. T. Morgan (United States); The Marquis Visconti Venosta (Italy); and M. Gram, representing Sweden and Norway. Award in favour of Great Britain.

Besides works quoted above, see Kamarowsky, *Le tribunal international* (translated into French by M. Westman); and publications of the Peace Society, International Arbitration League, *Bureau interparlementaire, pour l'arbitrage international*; Reports of the International Law Association, *Annuaire de l'Institut de Droit International*.

Arch.—See TUNNEL.

Archbishop (Latin, *Archiepiscopus*).—The title of archbishop was originally only one of honour, and did not convey to its holder any jurisdiction or authority. It first appears in the fourth century, and is applied to St. Athanasius. The Council of Nicæa recognise, however, the

pre-eminence of certain bishops, as of Alexandria, Rome, and Antioch. After the conversion of Constantine, the metropolitan, that is the bishop who presided over the church of the chief city of the province,—for the Christian Church had by that time brought its ecclesiastical organisation into correspondence with that of the State (see PROVINCE),—began to convoke provincial councils, and generally to exercise a superintendence over the other bishops and clergy in his province. In the eighth century, the use of the title of archbishop became common among leading bishops, and gradually it has been extended to nearly all metropolitans. It was at one time occasionally used of bishops who were probably not metropolitans. Thus, early writers apply the title to the bishops of St. David's, and even Bangor in Wales. St. Augustine was consecrated Archbishop of the English by Vergilius, Archbishop of Arles, in 597 A.D.

English law recognises at present only two archbishops and provinces in England—Canterbury and York. The see of Canterbury was founded by King Ethelbert in 597 or 598, and the first archbishop was St. Augustine. The see of York was founded about A.D. 622 by Edwin, King of Northumbria. The first archbishop was Paulinus. An archbishopric of Lichfield was afterwards established, but soon abolished, and the Welsh dioceses remained for several centuries outside both provinces. They now form a constituent part of the province of Canterbury. These are subordinate to each archbishop, who has within his province bishops of several dioceses. The suffragans of the Archbishop of Canterbury are seventeen bishops, holding sees of ancient foundation, viz.: Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Lichfield, Hereford, Llandaff, S. David's, Bangor, and S. Asaph; four bishops of sees founded by King Henry VIII. upon the dissolution of the monasteries, viz.: Gloucester and Bristol (now united, but likely soon to be again separated) (see 47 & 48 Vict. c. 66 (1884)), Peterborough, Oxford; and three bishops of sees founded in the present reign, viz.: S. Albans, Truro, and Southwell. The suffragans of the Archbishop of York are the bishops of Durham, Carlisle, and Sodor and Man, three ancient sees, the last annexed to York by King Henry VIII.; the bishop of Chester, a see founded by King Henry VIII.; and the bishops of Ripon, Manchester, Liverpool, Newcastle-on-Tyne, and Wakefield, all five modern sees, and founded, with the exception of Ripon, in the present reign. Until the latter half of the fifteenth century, the Archbishop of York enjoyed a metropolitan jurisdiction over the bishops of Scotland, all of whom derived their consecration from and swore canonical obedience to him; but in 1470 Pope Sixtus IV. created the Bishop of S. Andrews archbishop and metropolitan of all Scotland. Similarly, the Archbishop of Canterbury enjoyed, until 1152, the primacy over all Ireland. Each archbishop has the right of consecrating bishops in his province. The Archbishop of Canterbury is styled "Primate and Metropolitan of all England," although there is another archiepiscopal province within the realm; partly because, before the Reformation, he exercised, as papal legate, authority in both provinces, and partly because he has, by Stat. 25 Henry VIII. c. 21 (1533), the power of granting (in both provinces alike) dispensations in any case, not contrary to the Holy Scripture and the laws of God, in which the Pope used to grant them. In the first century after the Norman Conquest, the Archbishop of Canterbury seems sometimes to have been styled patriarch, *orbis Britannici Pontifex*, and even *alterius orbis Papa*. He has the privilege of crowning the king; when vested in the archbishopric, he is said to be enthroned, while a bishop is merely installed;

and divers bishops are his officers: the Bishop of London his provincial dean, the Bishop of Winchester his chancellor, the Bishop of Salisbury his precentor, and the Bishop of Worcester his chaplain. He may retain and qualify eight chaplains, enjoys the titles of Grace and Most Reverend Father in God, and writes himself "by Divine Providence," not, as bishop, "by Divine permission." He is the first peer of the realm, ranking immediately after princes of the Blood Royal, and before all the nobility and officers of State. The Archbishop of York is styled "Primate of England," and shares with the Archbishop of Canterbury the titles of Grace and Most Reverend Father in God; like the other primate, he writes himself "by Divine Providence," is said to be enthroned, and may retain and qualify eight chaplains; and he has the special privilege of crowning the Queen Consort, and of being her perpetual chaplain. He ranks immediately after the Archbishop of Canterbury and the Lord Chancellor. An archbishop is recognised by the English law as having two concurrent jurisdictions: one as bishop within his own diocese (see BISHOP), the other a jurisdiction through his whole province to correct and supply defects of other bishops. Thus he may visit and inhibit a bishop in his province, and cite him for ecclesiastical offences (*Ex parte Read*, 1888, 13 P. D. 221; and see *Read v. Bishop of Lincoln*, 1889, 14 P. D. 88). An appeal from his Court lies to the Judicial Committee of the Privy Council. Under Stat. 1 & 2 Vict. c. 106, ss. 43, 54 (1838), an appeal lies to him from the bishop in case of refusal of licence of non-residence, and in case of sequestration. The powers given to the Archbishop of Canterbury by the before-mentioned Statute of 1533 are chiefly exercised in granting licences to be married at any place and time, and to hold two livings at once. He also (but not the Archbishop of York) may grant degrees of all kinds, and visit both Universities. If any see is vacant, the archbishop is guardian of the spiritualities by prescription or composition, whereby all episcopal rights of the diocese belong unto him, and all ecclesiastical jurisdiction is exercised by him or his commissioners for the time; but by canon law the dean and chapter are guardians. An archbishop, on receipt of the royal writ, calls the bishops and clergy within his province to meet in convocation. See CONVOCATION. An archbishop, at common law is, a corporation sole. As to the mode of election of archbishops, see BISHOP; CONGÉ D'ELIRE. As to the right of an archbishop to sue to restrain the waste of ecclesiastical property, see GLEBE. See also Public Worship Regulation Act.

[*Authorities*.—Phillimore, *Ecclesiastical Law*, 2nd ed.; Godolphin, *Reportorium*; Hook, *Ecclesiastical Dictionary*.]

Archdeacon—an ecclesiastical officer subordinate to a bishop, and in modern times exercising a certain jurisdiction arising out of grant from the bishop. The office of archdeacon is found in every branch of the Catholic Church, but the authorities and functions of an archdeacon vary considerably in different places and at different periods. The office may be traced in the early Church, as far back as 260 A.D. It is probable, however, that, at least in some places, it was confined to the cathedral church, and did not extend over the whole diocese. The archdeacon's original functions may be gathered from the name given to him in the Tridentine Decretals and in earlier authorities, *oculus episcopi*.

His original duties were to attend the bishop at the altar, and to manage all matters relating to the deacons and other inferior officers in their ordinary duties for the performance of divine worship; to assist the

bishop in the management of the diocesan revenues; to assist him also in preaching and in the ordination of inferior clergy, as subdeacons and acolytes (*q.v.*); and to censure, when necessary, the inferior clergy, but not in the early centuries the presbyters. See CENSURE.

It will be noticed that at this period the archdeacon possessed no functions of jurisdiction. Probably these functions gradually grew up after the seventh century. After the time of Gratian the archdeacon began to be chosen from the ranks of the presbyters.

The office of archdeacon, it is scarcely necessary to say, has existed from the earliest times in the Church of England. The division of the country into archdeaconries commenced only after the Norman Conquest. Prior to that date, the archdeacon appears merely as an officer attached to the bishop, and in some respects he resembled rather the modern chancellor, or vicar-general, as he had a general capacity to act for the bishop as such throughout the whole diocese. Gibson says, the power of the archdeacons in that ancient state was chiefly a power of inquiry and inspection, which Lyndwood calls *scrutatio simplex*, when explaining, in the following words, the common-law position of an archdeacon: "Visitacionem per modum scrutationis simplicis, tanquam Episcopus Vicarii, habet Archidiaconus de jure communi" (Lyndwood, *Prov.* p. 49; Gibs. *Cod.* tit. xlii. ch. viii. p. 969).

It is doubtful when the archdeacon commenced to exercise judicial functions. Before the Norman Conquest, however, when ecclesiastical like civil business was transacted in the Court of the Hundred, the archdeacon appears occasionally to have sat as a judge for the bishop, and thus before the ordinance of William I., separating the spiritual from the temporal courts, he had apparently commenced to exercise judicial functions as the bishop's delegate. The words in the ordinance are: "Propterea mando et regia auctoritate præcipio, ut nullus episcopus vel ARCHIDIACONUS de legibus episcopalibus amplius in hundred placita teneant, nec causam quæ ad regimen animarum pertinet ad iudicium sæcularium hominem adducant" (Stubbs, *Select Charters and Documents*, p. 85).

This ordinance, which established the Consistory Courts (*q.v.*), enabled the bishops to assign to archdeacons in the several districts appointed to them a delegated episcopal jurisdiction, to be exercised archidiaconally by them. All such rights, however, of whatever kind, arise by grants, either made voluntarily, or of necessity (*i.e.* claimed and insisted on upon the footing of long usage), or by composition. The archdeacon is, however, in the eyes of the law, properly *ordinarius*, and is recognised as such by the books of common law, which adjudge an administration made by him to be good, though it is not expressed by what authority it is made, because, as it is done by the archdeacon, it is supposed to be done *jure ordinario*.

As a result of the constitution of archdeacons in particular localities, and the division of the country into archdeaconries, the general capacity of archdeacons to act as the bishop's vicar-generals came to an end (see CHANCELLOR (BISHOP'S); VICAR-GENERAL; OFFICIAL).

It naturally followed from the origin of the office, that the official powers of archdeacons varied considerably in different places, but by 6 & 7 Will. IV. c. 77, s. 19, it was enacted that all archdeacons throughout England and Wales should have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding. The Judge of the Archdeacon's Court, when the archdeacon does not sit in person, is called the official. The Act 24 Hen. VIII. c. 12 provides for an appeal from the Archdeacon's to the Bishop's Court; but where the

archdeacon has a peculiar, the appeal lies to the court of the archbishop (see *Parham v. Templer*, 1820, 3 Phillim. Rep. 243). In *Robinson v. Godsalve*, 1697, 1 Raym. (Ld.) 123, it was decided that where an archdeacon has a peculiar jurisdiction, he is totally exempt from the power of the bishop, and if any person who lives in the peculiar be sued in the Bishop's Court, a prohibition shall be granted; but if the archdeacon has not a peculiar, proceedings may be indifferently commenced in the Bishop's or Archdeacon's Court (see PECULIAR). There are only a few reported cases of modern decisions by an Archidiaconal Court, and they mostly relate to such matters as the giving of faculties and the appointment of churchwardens. They include the following:—*The Churchwardens of St. John's, Margate v. The Parishioners, Vicar, and Inhabitants of the same*, 1794, 1 Hag. Con. 198; *Adey v. Theobald*, 1836, 1 Curt. p. 447; *R. v. Archdeacon of Middlesex*, 1835, 3 Ad. & E. 615; *Westerton v. Davidson*, 1854, 1 Sp. Eccl. & Adm. p. 385.

Proceedings in the Archdeacon's Court, as in other ecclesiastical courts, commenced by citation.

Since the Church Discipline Act, 1840 (3 & 4 Vict. c. 87, secs. 22 and 23), no criminal suit for an offence against the laws ecclesiastical can be instituted against a clerk except in the Archbishop's or Bishop's Court, and the jurisdiction of the bishop or archbishop is extended to places exempt or peculiar, situate in the bishopric or archbishopric.

An archdeacon within the jurisdiction of his archdeaconry may have his visitation every year, but is obliged to make a triennial visitation. In all matters relating to his jurisdiction, the archdeacon has authority by custom over lay as well as ecclesiastical persons, and where he may take cognisance of a matter, then he may also give sentence and condemn. It is expressly enjoined in the Canons "that archdeacons and their officials shall at their visitation of churches take the fabrick thereof into special consideration, specially of the chancel, and in case there be need of reparation shall set or fix a time within which such reparations shall be finished, which time is likewise to be set under a certain penalty." See CHURCH RATES; CHURCH BUILDINGS.

An archdeacon has, since the time of Henry I., been summoned to Convocation, and he is at law a corporation sole. See CORPORATIONS. By the Canon Law he must be twenty-five years of age. An archdeacon may not grant letters dimissory (*q.v.*). At Canon Law he is the proper authority to examine candidates for holy orders. The following are the principal modern statutes relating to archdeacons:—

14 Car. II. c. 4.—Under this Act archdeacons must read the common prayer, and declare their assent thereto before the ordinary.

6 & 7 Will. IV. c. 79.—Under this Act all the archdeaconries in England and Wales are to be in the gift of the bishop in whose diocese they are situated; and see *supra*.

1 & 2 Vict. c. 106.—Under this Act an archdeacon may, with certain exceptions, hold two benefices with an archdeaconry, or a benefice and a cathedral preferment.

3 & 4 Vict. c. 113, ss. 6, 16, 27, 33, 34, 35, 36, 37.—Under this Act it is provided that in any cathedral church in which, by the suspension of canonries, the number of canons is reduced to four, one of such suspended canonries may, by the authority thereafter provided, if it be deemed necessary for the purpose of endowing an archdeaconry or archdeaconries, be filled up subject to the provisions thereafter contained respecting the endowment of archdeaconries by the annexation of canonries thereto.

Special provisions are made in the same Act for the appointment of an Archdeacon of London or Lincoln, to the new canonries added by the Act to the chapters of the cathedral churches of St. Paul's London, and Lincoln. It is also enacted that no person shall, be appointed to an archdeaconry who has not been six years in priest's orders (Cripps, *Laws of the Church and Clergy*, 133-135).

The same statute also provides the endowment of archdeaconries, and mentions an archdeacon as among those persons who may act as an episcopal assessor under sec. 86, 7 & 8 Vict. c. 59. See ASSESSORS. Under this Act the Archdeacon's Court is empowered to deal with questions relating to parish clerks.

See also the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), as to the election of surveyors of dilapidations, and 34 & 35 Vict. c. 44 (Incumbents Resignation Act, 1871), as to an archdeacon being a commissioner thereunder, s. 50. See also, on the same point, 48 & 49 Vict. c. 54, sec. 3; 4 & 5 Vict. c. 39, as to further provisions for endowment of archdeaconries; 6 & 7 Vict. c. 77, as to Welsh archdeaconries; Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 44). Under this last Act an archdeacon may make representations as to any church or burial-ground in his archdeaconry.

[See Gibs. *Cod.* 5; Phillimore's *Ecclesiastical Law*, 2nd ed., vol. i.; Lyndwood, *Prov.*; Hook, *Ecclesiastical Dict.* 7; Bingham, *Antiquities of the Christian Church*.]

Archdeacon's Court.—See ARCHDEACON.

Arches, Court of.—The Court of Arches, otherwise called the Arches Court of Canterbury, is the tribunal wherein the appellate jurisdiction of the Archbishop of Canterbury, as Metropolitan of the province of Canterbury, is exercised. See ARCHBISHOP. The Court is so named from its having been anciently held in the Church of St. Mary-le-Bow (*in ecclesiâ Beatæ Mariæ de Arcubus*), London. This parish was one of thirteen in the City of London which formerly belonged to the Archbishop's peculiar jurisdiction, exempt from that of the Bishop of London. See BISHOP OF LONDON. The Official Principal (*q.v.*) originally exercised the Metropolitan jurisdiction, the Dean of the Arches being a distinct officer who exercised the peculiar jurisdiction. The custom obtained of substituting the Dean of the Arches for the Official Principal in the latter's absence. For several centuries no Dean of the Arches has been appointed *eo nomine*, though the title has been commonly applied to the Official Principal.

The Court of Arches, as the Provincial Court of Appeal, has cognisance of appeals from the Consistory Courts (*q.v.*) of the various dioceses in the province of Canterbury, and, from the exercise of his ordinary or visitatorial jurisdiction, in contentious causes or matters, by any bishop of the province (*Boyd v. Phillpotts*, 1874, L. R. 4 Ad. & Ec. 297). By the Statute of Appeals (24 Hen. VIII. c. 12, s. 6), appeals must be interposed within fifteen days of sentence.

By letters of request from any ordinary of the province, the Court also entertains in the first instance suits in the cognisance of such ordinary. This jurisdiction was expressly reserved by the Statute of Citations (23 Hen. VIII. c. 9), and considerably extended by the Church Discipline Act, 1840, 3 & 4

Vict. c. 86, s. 13 (*Sheppard v. Phillimore*, 1869, L. R. 2 P. C. 450). A citation to the Court was termed a decree under seal. It has been held that the judge of the Arches Court has the power himself to deprive a clerk, notwithstanding Canon 122 of 1603 (*Burgoyne v. Free*, 1829, 1 Hag. Ec. 456, 662; *Bonwell v. Bishop of London*, 1861, 14 Moo. P. C. 395).

Formerly proctors (*q.v.*) had an exclusive right to practise in the Court of Arches, but now, by the Solicitors Act, 1877, 40 & 41 Vict. c. 25, s. 17, solicitors (*q.v.*) have a co-ordinate right. Barristers seem to have a right of audience in lieu of advocates, merely *ex necessitate rei* (see the Court of Probate Act, 1857, 20 & 21 Vict. c. 77, ss. 116, 117; and *Mouncey v. Robinson*, 1867, 37 L. J. Eccl. 8).

By the Public Worship Regulation Act, 1874, 37 & 38 Vict. c. 85, it was enacted (s. 7) that the Archbishops of Canterbury and York might, subject to the approval of Her Majesty, appoint from time to time a practising barrister of ten years' standing, or a person who had been a judge of one of the superior Courts (being a member of the Church of England), to be, during good behaviour, "a judge of the Provincial Courts of Canterbury and York"; and that whensoever a vacancy should occur in the office of Official Principal of the Arches Court of Canterbury, the judge should become *ex officio* such Official Principal, and all proceedings thereafter taken before the judge in relation to matters arising within the province of Canterbury should be deemed to be taken within the Arches Court of Canterbury.

In pursuance of this Act, Lord Penzance, who had been successively a Baron of the Exchequer and judge of the Courts of Probate and Divorce, was on 28th October 1874 appointed by the two Archbishops "the judge of the Provincial Courts of Canterbury and York" for the purposes of the Act. The Queen signified her approval on 14th November 1874. Sir Robert Phillimore, who had been since 1st August 1867 Official Principal of the Arches Court, resigned that office on 20th October 1875, whereby Lord Penzance became, by force of the Act, statutable Official Principal (*Dale's Case*, 1881, 6 Q. B. D. 376; see also *Green v. Lord Penzance*, 1881, 6 App. Cas. 657).

Notwithstanding such statutable title, the then Archbishop (Tait), on 23rd March 1878, purported to give Lord Penzance a confirmatory patent in the office of Official Principal of the Arches Court of Canterbury. This patent, whatever its original value, not having been confirmed by the Dean and Chapter of Canterbury, is probably not binding on the successors of the Archbishop who granted it. Lord Penzance's title, it is conceived, still rests solely on the Act of 1874.

The Clergy Discipline Act, 1892, 55 & 56 Vict. c. 32, s. 4, gives an appeal against any judgment of a Consistory Court under that Act, at the option of the appellant, to the Provincial Court (*q.v.*), or to the Queen in Council; but if to the Provincial Court, its decision is final. In other cases an appeal lies from the Arches Court to the Queen in Council (see the Privy Council Appeals Act, 1832, 2 & 3 Will. iv. c. 92, and the Judicial Committee Act, 1833, 3 & 4 Will. iv. c. 41; see also APPEALS).

The general practice of the Court is regulated by the Rules of 1st January 1867, for which see 36 L. J. Eccl. 1.

The special procedure under the Public Worship Regulation Act, 1874, is regulated by the Rules and Orders of 22nd February 1879, made under sec. 19 of that Act, for which see 4 P. D. 250.

[*Godol. Abr.* 100; *Gibs. Cod.* 1004; *Phillimore, Eccl. Law*, 2nd ed., ii. 924; Report of Ecclesiastical Courts Commissioners, 1883.]

Architect.—Like the word engineer, which may mean a civil engineer, a practical engineer, or an engine-driver, the word architect has a very comprehensive meaning.

An architect in the highest and best sense of the word should have qualified himself for his profession by the study of ancient architecture, and should have seen, sketched, and measured the best examples at home and abroad. His studies should of necessity have been very wide; for while devoting himself more especially to church architecture, domestic architecture, and the architecture of public buildings, he cannot neglect colour decoration, metal-work, and all the various subjects which are comprehended in the design and execution of a work of artistic and architectural merit.

These studies will, however, be of little use to him unless he has also acquired sufficient practical knowledge to advise his employer as to the probable cost of the proposed work, and to keep within such limits in carrying out the work which he has designed.

The practical knowledge which an architect must possess includes a thorough acquaintance with the materials which he intends to use, both as to their strength and durability and as to their method of application to the work.

It is the difficulty of finding these practical and business qualifications, combined with artistic acquirements, in one individual, which makes great success as an architect such a rare occurrence.

Disputes are constantly occurring between the members of the architectural profession as to whether an architect should be an artist, and whether, if he is an artist, he can, without lowering his position, stoop to consider practical matters, or the ways and means of carrying out his designs.

But there can be no doubt that the general public, whenever they consult an architect, however artistic and whatever his architectural knowledge may be, have a right to expect that the person whom they consult should know the practical as well as the artistic side of his profession, and that he should have sufficient business knowledge of prices and of ordinary contracting work not to lead his employer into extravagance, or into monetary or other liabilities beyond what may have been agreed upon between them.

It is as little satisfaction to an employer to possess a building which has cost twice what he intended to spend, as to have an ugly building built within the estimated cost.

Having thus described what may be termed the general nature of the profession, it is necessary to describe shortly the various branches.

There is the architect, for instance, whose practice lies in building warehouses and business premises. He, instead of requiring artistic knowledge (though such qualifications are always of advantage), must have almost an engineering acquaintance with the strength of materials, as, for instance, with the strains of girders and the crushing weight of columns.

There are other architects who are specialists in theatre, hospital, school, or other buildings, as the case may be: each line of work requiring special knowledge.

There is also the architect who designs and superintends the erection of villa residences, and undertakes any ordinary everyday building work which may fall in his way. He may not, and probably in many cases does not, know the difference between one style of architecture and another, yet he may possess very considerable practical knowledge and business qualifications.

And so one may descend the ladder, until one finds the architect who

mixes up his profession with that of an auctioneer, or even with that of a builder, for no diploma or examination is necessary to enable a man to call himself an architect, to practise as such, and to recover fees for his services.

If architects, however, practise as valuers, or value materials and labour otherwise than merely for the information of their employer, they must be duly licensed under 46 Geo. III. c. 43, ss. 4-7. This necessity of obtaining a licence to value appears to have been overlooked by the architectural profession, for few architects take out any such licences.

The duties and liabilities of architects are fully set out in Hudson on *Building Contracts*, pp. 24-74. But, briefly, the architect's duties and liabilities are limited to the work he is employed to perform.

If he is only asked to prepare designs, his duty consists in preparing proper and suitable designs, or in preparing them according to instructions. On the other hand, if he is employed to carry out the building from the designs he has prepared, his duties become very varied and complicated, and his liabilities also are not inconsiderable.

From the date of such instructions he becomes the agent of the building owner, and he is liable just the same as any other agent would be if he exceeds his authority.

His duties also consist in advising his employer as to the cost of the proposed work; in negotiating with builders in reference to their employment, whether with or without a previous estimate; in preparing working drawings for the execution of the works, and in superintending them; in certifying for payment to the builder from time to time; and finally, in passing the building and settling up the accounts.

Any negligence in the performance of such duties would render the architect liable to his employer, and such liability is in no way limited to the amount of the architect's fees. Thus, for instance, if an architect were to certify payment for bad work, or certify for more money than was due to the builder, the architect's liability to the building owner would be exactly the amount of damage which the building owner had sustained by the negligence of the architect (*Rogers v. James*, 1891, rep. at p. 113, vol. ii. Hudson on *Building Contracts*; and see BUILDING CONTRACTS). This liability of the architect arises on the implied undertaking, which any person exercising a profession makes, that he is competent to exercise, and that he will exercise, due skill and care in the performance of the duties which he has taken upon himself to perform.

The architect, however, is in no way liable to the builder unless he is employed by him, or unless the architect has prevented the builder from performing his contract, as, for instance, by unfair or dishonest condemnation of materials, or by unfairly or dishonestly refusing to certify moneys due to the builder.

In almost all building contracts the architect, besides being the agent of the building owner, is placed in a quasi-judicial position, in which he has to decide as to the quality of materials and work, the amount due to the builder, and other incidental matters, and sometimes he is made the arbitrator between the parties. In the performance of these services he has only one duty, and that is to act fairly and honestly; and if he so acts, he is under no liability to anyone in so far as he is acting in a quasi-judicial position or as arbitrator; but though he cannot be sued in that capacity, yet he may be sued as architect, for any negligence in his profession, by the person who has employed him (see *Rogers v. James*, before cited).

The authority of architects is generally defined by the building contract,

and if they exceed their authority they may become liable to the builder or the building owner. Thus, in the ordering of additional work, if the architect has no authority conferred upon him by the terms of the contract, and no express or implied authority apart from the contract to order extras, he would, if he ordered additional work, for which the building owner refused to pay, render himself liable to the builder for damages in an action for breach of warranty of authority, and for any expenses which the latter has reasonably incurred in suing the building owner. On the other hand, if the building owner were obliged by the terms of the building contract to pay the builder for this additional work, which he had never authorised, he could sue the architect for damages for having exceeded his authority.

The charges of architects have been the subject of much legal discussion, but the result of the cases is that architects are only entitled to recover reasonable charges. The Royal Institute of British Architects have, however, fixed a scale of charges, which, though it may bind the members of that body, cannot bind the general public, unless the building owner has agreed to pay the architect upon such scale.

Speaking roughly, 5 per cent. on the cost of the works is an architect's usual fee; but this fee might be quite inadequate where the cost of the work is small, or where a great amount of designing or superintendence is required. On the other hand, such a fee might be excessive, for instance, where the work consisted in the building of a block of several buildings all alike.

The personal skill of the architect also is a matter for consideration in estimating whether the charges are reasonable or not.

In reference to the charges of architects, it must not be forgotten that a further charge is made for taking out quantities when an architect is instructed to get tenders, and this charge is also based upon a percentage on the cost of the work.

Quantities are generally prepared by a quantity surveyor, but sometimes by the architect himself. It often happens that the building owner is not informed as to this charge; and if a tender is accepted, nothing is heard of it by the building owner, because the percentage is added by the builder to his tender before he arrives at the sum total of his estimate. If, however, a tender is not accepted, the building owner finds that he is called upon to pay a sum varying from $1\frac{1}{2}$ to $2\frac{1}{2}$ per cent. on the cost of the work, either to the quantity surveyor or to the architect, for obtaining tenders which are useless. This practice causes many disputes which would be avoided if building owners were made acquainted with this charge in the first instance, before tenders are obtained.

The obligations of architects as to legal knowledge are not the same as those of a lawyer, and, to quote from Hudson on *Building Contracts*, 2nd ed., p. 54, "architects seem to be subject to the same rules as were laid down by Jervis, C. J., in speaking of ecclesiastical surveyors, that the surveyors 'could not be expected to supply minute and accurate knowledge of the law; but we think, under the circumstances, they might properly be required to know the general rules applicable to the valuation of ecclesiastical property' (*Jenkins v. Betham*, 1855, 15 C. B. 168; 24 L. J. C. P. 94)." Thus London architects ought to be sufficiently acquainted with the London Building Act, 1894 (see BUILDING ACTS), to prepare plans in accordance with its provisions, and to comply with its other requirements in relation to building work, and they must not neglect to consider the rights of adjoining owners. See ADJOINING OWNERS.

There are many other qualifications which architects should possess,

and the student will find these to some extent set out in the syllabus of subjects required for the examination to be passed preparatory to membership of the Royal Institute of British Architects. The Surveyors' Institute also hold examinations, and the subjects given by that body would indicate the necessary qualifications not only of surveyors, but of those who carry on the joint profession of "architects and surveyors."

The profession of a surveyor will be described under the head SURVEYOR; but when architects often practise as surveyors, and surveyors as architects, it is difficult to entirely separate one from the other.

Areas (Local Government).—See LOCAL GOVERNMENT.

Armistice (from Lat. *arma*, arms, and *sistere*, to stop).—A temporary cessation of hostilities by agreement between the belligerents. Its usual object is to consider overtures by one of the parties for the conclusion of peace. It thus differs from a "suspension of arms" or truce between two contending forces, for a local or military purpose only. In the French language the word applies to both: they are distinguished from each other as *general* or *partial* armistices. It follows from the above distinction that an armistice can only be concluded by the chief authority of State, or by a delegate of such authority possessing the necessary powers in that behalf.

Armorial Bearings (Armories, Armorial Ensigns, Coat of Arms, Coat Armour, *Insignia Gentilitia*).—Devices first adopted by wearers of close armour as marks of personal identity, and placed either on their arms, chiefly the shield, and other appurtenances of war, as banners, etc., or embroidered upon surcoats worn over the armour, and hence called "Coats of Arms."

In heraldry, as subsequently developed, armorial ensigns consist—(1) of the shield on which the devices are represented; (2) of numerous external appendages, such as the crest—which is distinct from, though frequently similar to, one of the bearings of the shield—over an heraldic wreath which is an essential part of it, the rule being, No wreath no crest; the motto, supporters, helmet, coronet, etc.

Many devices resembling those of heraldry have been found in almost all nations, but heraldry proper begins with the European feudal system; and there is no evidence that, even in Europe itself, hereditary arms were borne before the twelfth century, except by a few royal, or almost royal, families (Hallam, *Middle Ages*, p. 206, note). But there is something to be said for an earlier recognition of this hereditary character (Ellis, *Antiquities of Heraldry*). The *Leges Hostilidiales* of Henry the Fowler, of the date 938, contain not only specific directions regulating the use of *insignia gentilitia*, and of their registration by the heralds, but treat them as the exclusive privilege of the nobly born, and exclude from participation in the tournaments all whose ancestors had not borne them for at least four generations (Woodward and Burnett's *Heraldry*, vol. i. p. 27, *s.v.* "Nobility.")

But whether of earlier or of later origin, the use of armorial ensigns, as denoting nobility of blood, when the actual possession of a military fief did not of itself announce it, was thoroughly established at the commencement

of the thirteenth century, and the science, or art, of heraldry, as generally understood, was employed in representing, by devices, constructed according to technical rules, persons, their families and properties, their pretensions to honours or estates, their alliances and feudal tenures.

By this time, too, persons so using arms were recognised as having acquired an exclusive right to use them, and to transmit them to their descendants.

In 1419, Henry v. issued a proclamation forbidding all persons who had not borne arms at Agincourt, to assume them, except in virtue of inheritance, or of a grant from the Crown; and only in one of these two ways can a person be said to use armorial bearings legitimately.

Lord Coke, commenting on Littleton's statement (27, a, s. 31), that a gift of lands or tenements to a man, and his heirs male or female, confers an estate in fee-simple, says: "This rule extendeth not to the inheritance that noblemen and gentlemen have in their armories or arms. For where he hath a fee-simple in them yet is the same descendible to the heirs males lineall or collateral.

"For albeit a female be heire at the common law, yet the shield, armories, and arms descend unto them that are able to beare them. And all the females of that family, in respect that they be of the same blood, may, in a lozenge, or under a curtaine, manifest of what family they be, by expressing the armories and arms belonging to that family, and the husbands of them may impale or quarter them with their own, as the case shall require."

At sec. 210, 140, b, he compares this descent to that of gavelkind lands, and continues: "Which armes do not descende to all the bretheren alone, but to all their posterity. But yet, *jure primo-genituræ*, the eldest shall bear, as a badge of his birthright, his father's armes without any difference, for that he is more worthy of blood; but all the younger bretheren shall give severall differences—*et additio probat minoritatem*."

The Court of Chivalry continued to adjust all matters relating to armorial ensigns, and other matters relating to deeds of arms, or war, outside the cognisance of the common law, until Richard III. incorporated the College of Arms, or Herald's College (*q.v.*), for this purpose. No statutes, or cases in the Civil Courts, are to be found dealing with any of the questions with which the Court of Chivalry, or the College, were concerned. Neither had they the power of imposing penalties or imprisoning for a breach of the heraldic laws of arms. So that, as in the cognate case of the assumption of surnames (*q.v.*), armorial bearings may be assumed by anyone at pleasure, and they may be either brand new ones, unrecognised at the College of Arms, or those that have been borne by a family for centuries. The "right to bear arms" is now a phrase of little meaning when a new grant is applied for at the College; and, if made, it carries with it no proof of pedigree, or otherwise, receivable as evidence in the Courts. But armorial bearings used before the Revolution of 1688, especially those recorded in the *Minutes of the Herald's Visitations*, the last of which was in 1686, and the first in 1528, are admissible in pedigree cases (Taylor, *Evidence*, 9th ed., vol. i. s. 657).

A voluntary assumption of arms, however, by a person directed under the "name and arms" clause of a settlement, or will, to obtain the royal licence and a grant, would probably not be sufficient, but if every endeavour has been made to carry out the directions, the estate would not be divested by the failure (*Austen v. Collins*, 1886, 54 L. T. 903).

The exemplification of a grant of arms made by the College is "a sort

of family document in which every member of the family is interested, and whoever has possession of it is entitled to it, but may be called on to produce it" (*Stubs v. Stubs*, 1862, 31 L. J. Ex. 510).

The stamp duty on the licence of the Crown to take and use arms, in compliance with the injunctions of any will or settlement, is £50; or, upon a voluntary application, £10; and on a grant of arms or armorial ensigns by the Crown, or the College, £10.

By the Customs and Inland Revenue Act, 1869, 32 & 33 Vict. c. 14, s. 18, an annual licence must be taken out, and a duty of two guineas paid, for armorial bearings displayed on any carriage; and one guinea if displayed or worn otherwise, under a penalty of £20; but this licence confers no right to use the arms (s. 19); and any kind of emblem is included in the term "armorial bearings."

Proprietors of public carriages, licensed by local authorities, are exempt (s. 28).

The Commissioners of Inland Revenue do not require to take out licences—(1) Shopkeepers who use devices solely as trade-marks; (2) Corporations, or public companies, or any person using the corporate arms by right of office; (3) Officers or members of a club or society using thereat, or on its business, any armorial bearings, if the club or society has taken out a licence.

By sec. 20 of the Local Government Act, 1888, 51 & 52 Vict. c. 41, this tax, with others set out in Schedule I, and all fines and penalties incurred in relation to it, are to be handed over by the Exchequer to the County Councils; and, by order of Her Majesty in Council, the powers and duties of the Commissioners of Inland Revenue, and other officers, may be transferred to the County Councils and their officers.

The Patents, Designs, and Trade Marks Act, 1883, 46 & 47 Vict. c. 57, s. 106, prohibits, under a penalty of £20, the assumption of the royal arms in any trade, business, calling, or profession, without the authority of Her Majesty, or any of the royal family, or of any Government department.

Armour, Arms.—The Bill of Rights, 1 Will. & Mary, c. 2, s. 2, confers upon all subjects the right of carrying arms for defence, suitable to their condition and degree, and allowed by law. 2 Edw. III. c. 3, prohibits persons going armed under circumstances which may tend to terrify the people or indicate an intention of disturbing the public peace. The training of persons, without lawful authority, to the use of arms, is prohibited by 60 Geo. III. c. 1; and justices of the peace are authorised to disperse any assembly of persons found so employed. The Act 33 & 34 Vict. c. 57, imposes a penalty on persons using or carrying a gun elsewhere than in a dwelling-house or the curtilage thereof, without a licence, the duty on which is ten shillings. See ARMORIAL BEARINGS.

Arms, Offences with.—See FIREARMS.

Arms of the Sea.—See FORESHORE.

Army.—Before the Civil War of the seventeenth century there was no regular standing army in England; the constant endeavours of the

Crown to establish a body of men subject to military law both in peace and war, and liable to serve either abroad or at home, having always met with opposition from Parliament and the nation.

By the Bill of Rights (1 Will. & Mary, sess. 2, c. 2) the principle that the Crown could not raise or keep a standing army, in time of peace, without the consent of Parliament, was definitely established.

From the War of the Spanish Succession in 1702, England became constantly more involved in European politics, and the army grew into a regular and popular profession; but the existence of a permanent military force was never recognised by any statute. Since 1689 merely annual Acts, known as Mutiny Acts, or, since 1881, as Army Acts, have been passed, limiting the number of the forces which the Crown might raise and maintain for the current year.

Prior to this acquiescence of Parliament in the existence of a standing army, there were two kinds of military forces in the hands of the Crown. Firstly, the feudal array, which was liable, though under inconvenient limitations, to service abroad as well as at home, and soon became unequal to the demands of the kings upon it. The French wars of Edward III. and Henry IV. were carried on by men recruited by contract with men of rank, who engaged to procure voluntary enlistments.

Under the Tudors and Stuarts, the prerogative of pressing men was established by usage, and sanctioned by an Act of Philip and Mary. It was declared illegal by 16 Car. I. c. 28, which also provided that service should not be compulsory out of the country, unless founded on tenure.

By the Statute 12 Car. II. c. 24, 1661, the feudal tenures were abolished.

The other force was that of the militia; strictly domestic and defensive. By Statutes of Henry II. and Edward I. the defence of the counties was entrusted to the Sheriff, with enlarged powers, as the head of the county forces; and provisions were made for each adult furnishing arms according to his estate. In the reign of Mary, the Sheriff was replaced by the Lord Lieutenant of the county.

At the Restoration this militia was declared by 13 Car. II. c. 6, with all other forces by sea and land, to be under the sole government and command of the king, and it was then, and has since several times been, reorganised, and now forms part of the auxiliary forces of the Crown. See MILITIA; YEOMANRY; VOLUNTEERS.

Moreover, during this reign and that of James II., parliamentary sanction was given for keeping on foot the Guard to the Sovereign, which had indeed long been lawful, and for the maintenance of certain garrisons essential for the public safety. Under the title of "Guards and Garrisons," the home army was annually voted by Parliament till the beginning of this century; and the Guards have since been continued on the army establishment (Clode's *Military and Martial Law*, p. 5).

But in both reigns unauthorised additions were made, and Articles of War (see WAR, ARTICLES OF) issued for the government and discipline of these troops, which were contrary to constitutional principle. On actual service troops had always been subject to such Articles, "for always, preparatory to an actual war, the kings of the realm, by advice of the constable or marshal, were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law" (Hale, *Hist. Com. Law*, 40).

The Mutiny Act, 1689, 1 Will. & Mary, c. 5, was the first expression of the closer co-operation of Parliament with the Crown, and was due

to the threatened dangers to the new settlement of the kingdom. It recites the provisions of Magna Charta, that no man shall be punished, or judged, otherwise than by the established laws of the realm, but that it was requisite to retain such forces as should be raised in exact discipline, and enacts that every person in the army, as officer or soldier, found guilty by court-martial of mutiny, sedition, or desertion, might be punished with death, or otherwise as such court-martial should direct.

To this extent only was the power of the Crown over the army increased; but by the Mutiny Acts of 1715 and subsequent years, express authority was given to the Crown, in very wide terms, to make Articles of War for the army both at home and abroad; and in 1803 the Mutiny Act, and Articles of War, made under the various statutes, were extended to the army both within and without the Crown's dominions (43 Geo. III. c. 20). In 1879 the provisions of the Mutiny Act and the Articles of War contained in the Army Discipline and Regulation Act of the same year (42 & 43 Vict. c. 33) were consolidated into a code of military law, which was repealed and re-enacted with amendments by the Army Act, 1881, 44 & 45 Vict. c. 58. This Army Act must be annually re-enacted by a separate Act similar to the old Mutiny Acts. This latter Act specifies the number of troops to be continued for the year, and makes any amendments necessary in the renewed Act. The Army Act and the Queen's Regulations and Army Orders, made in pursuance of various statutes, form the code of military law.

British officers and men serving in India are also subject to this Act. For the Indian and Colonial Forces, see titles—INDIAN ARMY; and COLONIAL FORCES.

The forces governed by this code are the regular and the auxiliary forces. The regular British forces are the army, provided for by the annual Army Discipline Act; the reserve forces, authorised by the Reserve Forces Act, 1882, 45 & 46 Vict. c. 48; and the Royal Marines, under the control of the Admiralty, but subject to the Army Act when not serving on board, and in other respects treated as soldiers. See ROYAL MARINES.

The auxiliary forces are the militia and the militia reserve, the yeomanry, and the volunteers (*q.v.*).

The men of the militia are subject to the code during their preliminary training, their annual training, when they are acting with the regular forces, and during embodiment; but the officers are subject to it at all times (Army Act, s. 176 (6)).

The yeomanry are subject to it during their annual training, when acting with the regular troops or militia, or on active service, or when serving in aid of the civil power.

As to other persons subject to it, who may be treated as officers or soldiers, see s. 175 (7), (8), and s. 176.

But all these various classes of persons remain liable to the ordinary civil and criminal law (*Burdett v. Abbott*, 1812, 4 Taunt. 401; 12 R. R. 450), and have the same rights as civilians in respect of voting for and serving as members of Parliament (s. 144; and see also *Atkinson v. Collard*, 1885, 16 Q. B. D. 254, as to claims for votes in respect of occupation of military quarters).

There are, however, some necessary limitations of this rule whilst the soldier is in the service. He cannot change his domicile or settlement. His marriage is legal without the consent of the military authorities, but they will not provide for his family; and he is not chargeable with desertion, or neglecting to maintain, or leaving them chargeable to the

union. There are, however, special provisions in the Army Act for deduction from pay for their maintenance, or for a bastard child (s. 145). He cannot be arrested or compelled to appear before any Court for a civil debt, damages, or sum of money under £30; but the creditor may sue and have execution, so long as he does not touch the person, pay, or military equipment of the soldier (s. 144). An officer or soldier cannot legally assign, or charge, his pay or pension (s. 141). On actual military service, an officer or soldier may make a nuncupative will as to his personal estate. Officers are exempt from licence duty for their soldier servants. The occupation of property by an officer, in respect of his office, is the occupation of the Crown, and he is not liable, therefore, for local rates. Officers and soldiers, when on duty, are exempt from tolls (s. 143). Officers of the army, militia, or yeomanry, while on full pay, are exempt from serving on juries—absolutely as to coroners' juries; but as to a grand or common jury, only if their names are not on the list; so that proper objection must be taken in time. A soldier is altogether exempt (s. 147). Officers on full or half-pay are also exempt from serving any municipal office, by the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 253; and from serving the office of overseer. But officers are not ineligible for membership of a County Council. They are prohibited by the Queen's Regulations from joining the directorate of any public or other company, without permission from the Commander-in-Chief.

By sec. 41, a person under military law may be tried by court-martial for treason, murder, manslaughter, rape, treason-felony, or any other offence punishable by the law of England; but, in the case of the crimes particularly specified, only if they are committed outside the United Kingdom, or if outside the United Kingdom and Gibraltar, but within Her Majesty's dominions, at a place more than one hundred miles from any city or town where they can be tried by a competent Civil Court.

By sec. 95, aliens may be enlisted if Her Majesty signify her consent through the Secretary of State; but in any corps there must not be more than one alien to every fifty British subjects; and an alien so enlisted cannot hold any higher rank than warrant-officer, or non-commissioned officer.

Recruits may purchase their discharge within three months of enlistment, on payment of £10 (s. 81). Apprentices under twenty-one years may be claimed by their masters; subject to the provisions of s. 96.

As to persons under liability to billet soldiers, ss. 102–111.

As to impressment of carriages, ss. 112–121.

By ss. 125 and 126, witnesses at courts-martial have the same privileges as witnesses in Civil Courts. If a civilian refuses to give evidence, to take the oath or affirmation, to produce documents, on the president so certifying, he may be punished by a Civil Court as if for contempt of that Court; and so in the case of perjury.

A court-martial is governed by English law only, and the rules of evidence are the same as in the Civil Courts (ss. 127–128).

Counsel may appear at general and district courts-martial, and address the Court.

Excess of jurisdiction is restrained by the writs of prohibition, *certiorari*, or *habeas corpus* (*q.v.*); and members of a court-martial, or individual officers, are subject to actions for damages, and criminal proceedings, for injury caused to any person by acts done without jurisdiction, or in excess of jurisdiction. But a Court of law will not interfere if the injury done affects only a person's military character or position. See ABUSE OF PROCESS.

On the relation of Courts of law to courts-martial, see COURTS-MARTIAL. [See *Manual of Military Law* (War Office, 1894); Anson, *Law and Custom of the Constitution*, pt. ii.; Dicey, *The Constitution*; and see BILLETING; COMMISSION; DESERTION; ENLISTMENT; FURLOUGH; IMPRESSMENT OF CARRIAGES; Military Tramways Act, 1887, 50 & 51 Vict. c. 65; Military Lands Act, 1892, 55 & 56 Vict. c. 43.]

Arraignment is the bringing of a person (against whom an indictment or inquisition has been found) to account (*ad rationem*) before the Court which is appointed to try him. The accused is first called to the bar of the Court, and surrenders, or is brought in custody to the bar of the Court, or is placed in the dock. He must not be in fetters, unless it be made necessary by apprehended violence, or risk of rescue, or escape (Hawk., P. C., bk. ii. c. 28, s. 1; Arch. Cr. Pl., 21st ed., 159). The indictment is read, or the charge stated to him, by the Clerk of the Court, and he is asked whether he is "guilty or not guilty." Before this question is answered, all legal exceptions or objections to the proceedings (*exceptiones præjudiciales*) are to be stated, by demurrer, motion to quash, or plea in abatement, or in bar, or to the jurisdiction, or of autrefois acquit or convict. See each of these headings. If none of these objections are taken, or all fail, the accused must plead to the indictment. If he fails or refuses to plead "guilty or not guilty," the Court proceeds to inquire—(1) whether he is mute of malice, or by the visitation of God, (2) whether he is able to plead and understand the course of his trial, or (3) whether he is insane; and a jury is sworn to determine one or all of these issues. If he is found mute by the visitation of God, but sane, the Court directs entry of a plea of not guilty, if there is any prospect of making him understand the proceedings at the trial. If the accused is mute of malice, or will not plead directly to the indictment, a plea of not guilty is entered under 7 & 8 Geo. IV. c. 28, s. 2 (which supersedes, but does not expressly repeal 12 Geo. III. c. 20). At common law, refusal to plead in case of treason or misdemeanour was taken as equivalent to a plea of guilty, and in case of felony exposed the accused to the *peine forte et dure* to plead and consent to his trial *in pais*, until 12 Geo. III. c. 20 (Stephen, *Hist. Crim. Law*, i. 289; Pike, *History of Crime*, i. 218, 283; Pollock and Maitland, *Hist. Eng. Law*, ii. 648). If the jury find the accused to be insane, so as to be unfit to plead, the Court records the finding, and orders his detention as a criminal lunatic, to await the Queen's pleasure (39 & 40 Geo. III. c. 94, s. 2). See ASYLUMS; LUNACY.

The old formalities of raising the hand when pleading guilty or not guilty, and the election of the accused as to the mode of his trial "by God and my country," are now disused, and the pleading of the plea "not guilty," without more, entitles the accused to trial by jury, except where he has and claims privilege of peerage (7 & 8 Geo. IV. c. 28, s. 1); see PEERAGE (*Privilege of*). The plea of not guilty is recorded by the Clerk of the Court on the indictment, by writing the word "puts," which, when a complete record is made up, is expanded to a statement of the election of the accused to be tried *in pais*, and the acceptance of that mode of trial by the prosecution, known in law as the *similiter* (See Stephen, *Hist. Crim. Law*, i. 297, 298; 7 Geo. IV. c. 64, s. 21).

On a plea of not guilty, issue is now taken as joined, and the clerk proceeds to call and swear the jury. On a plea of guilty, the Court proceeds to judgment.

Where the indictment contains a charge of a previous conviction, the

charge must not be mentioned on arraignment, nor until after confession or conviction of the subsequent offence (7 & 8 Geo. IV. c. 28, s. 11; 6 & 7 Will. IV. c. 111; 24 & 25 Vict. c. 98, s. 116; c. 99, s. 37; 34 & 35 Vict. c. 112, s. 9).

Where indictments for treason or felony are tried in the Queen's Bench Division of the High Court, the same procedure is usually followed (see Crown Office Rules, 1886, r. 132); but in the case of an indictment or information for misdemeanour there tried, the pleading is done in the Crown Office, and the pleadings are opened, as in civil cases, without arraignment (Crown Office Rules, 1886, rr. 128-133). See CLERK OF ARRAIGNS.

Arrangement (Deeds of).—See BANKRUPTCY.

Array.—See JURY.

Arrest is physical interference with the liberty of any person, to compel his attendance before a Court of justice, or to compel fulfilment of a legal obligation.

1. *In Civil Proceedings.*—(a) Arrest of persons on civil process is now obsolete, except in the cases of disobedience to or contempt of a Court of civil jurisdiction, certain classes of debtors who refuse to pay their debts (32 & 33 Vict. c. 62; 33 & 34 Vict. c. 76), or against whom bankruptcy proceedings have been commenced, and the now rare use of the writ *ne exeat regno* (see BANKRUPTCY; CONTEMPT OF COURT; DEBTOR). (b) As to arrest of ships, see ARREST OF SHIP.

2. *In Criminal Proceedings.*—In criminal cases arrest may be effected in the case of any offence, whether indictable or summarily punishable, on the warrant under hand and seal of a justice, issued under the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, ss. 1, 2, 3, or the Summary Jurisdiction Act, 1848, 11 & 12 Vict. c. 43, s. 2, after a sworn information has been laid before him. Judges of the Supreme Court have the jurisdiction of justices for every county; and also, in exercise of their ordinary powers, can issue bench warrants (*q.v.*) for the arrest of any offender, including a person charged with criminal contempt of Court, or can proceed by way of writ of attachment, a process employed chiefly in case of contempt, or in Crown suits (Hawk., P. C., bk. ii. c. 22). Arrest on the parole authority of a judge or justice is not resorted to except in the case of contempt, in face of a Court of record, or riots, or affrays (2 Hale, P. C., 86). The warrant or writ must specify the charge on which the person named is to be arrested, general warrants being void (*Entick v. Carrington*, 1765, St. Tri. 1029). Writs of attachment are directed either to the sheriff or an officer of the Court. Other warrants, either to a particular named person, who need not be a constable, or generally to all police officers for the county or borough, for which the Court or justice is sitting, or has jurisdiction (11 & 12 Vict. c. 42, s. 10; c. 43, s. 3).

The person intrusted with the warrant can only execute the warrant within the county or borough for which it is issued, or, in the case of fresh pursuit, within seven miles of the border, measured as the crow flies (11 & 12 Vict. c. 42, s. 10; c. 43, s. 3; 52 & 53 Vict. c. 63, s. 34). But a metropolitan police officer can execute anywhere a warrant issued by a metropolitan police magistrate (2 & 3 Vict. c. 71, s. 17); and borough police can

execute a warrant issued by a borough justice, in the county of which the borough is part, or anywhere within seven miles of the borough (45 & 46 Vict. c. 50, s. 223); and the police of Northumberland and Cumberland can execute English warrants in the border counties of Scotland (20 & 21 Vict. c. 72, s. 11). Outside the county of issue (with the exceptions above stated) the warrant of a justice must be "backed," i.e. indorsed by a justice of the county, before it can legally be executed (11 & 12 Vict. c. 42, s. 11), and the same rule applies as to the execution in England of warrants issued in any other part of the British Islands (11 & 12 Vict. c. 42, ss. 12, 13, 15; c. 43, s. 3; 44 & 45 Vict. c. 24, s. 4). As to the arrest of fugitive offenders from other parts of the empire and foreign countries, see EXTRADITION; FUGITIVE OFFENDER. A warrant of arrest for an indictable offence can be issued or executed on Sunday (11 & 12 Vict. c. 42, s. 4; 29 Chas. II. c. 7, s. 6). A warrant remains in force till executed or discharged by order of a Court (Hawk., P. C., bk. ii. c. 13, s. 27). Outer and inner doors may be broken open to effect arrest under warrant, after demand and refusal of admittance (Hawk., P. C., bk. ii. c. 14; Fost., 2nd ed., 320). A warrant of arrest is usually executed by showing the warrant or reading the charge to the person to be arrested, and laying hands on him, and taking him in custody, either to a police station, till he can be brought before a justice, or taking him straight before a justice. In felony cases, an officer who has not the warrant, but knows of its issue, may arrest without it (*Creagh v. Gamble*, 1890, 24 L. R. Ir. 458). In cases of misdemeanour, it is essential that the officer should have the warrant in his possession (*Codd v. Cabe*, 1876, 1 Ex. D. 352). The prisoner must not be treated with indignity or be handcuffed, unless there is risk of rescue or escape (*Wright v. Court*, 1825, 4 Barn. & Cress. 596). The guilt or innocence of the person does not affect the legality of the arrest, so far as the officer is concerned, provided that the warrant purports to be for an offence over which the person issuing it has jurisdiction (Hawk., P. C., bk. ii. c. 13, ss. 10, 11; *Henderson v. Preston*, 1888, 21 Q. B. D. 362); nor is the validity of a warrant affected by the death, before arrest, of the justice who issued it (42 & 43 Vict. c. 49, s. 37). See also WITNESS.

Arrest without Warrant by any Person.—Any person may at common law arrest, without warrant, anyone who in his presence commits a felony, or gives a dangerous wound, or whom he reasonably suspects of having committed a felony, if a felony has in fact been committed (*Beckwith v. Filby*, 1827, 6 Barn. & Cress. 635; *Allen v. L. S. W. R.*, 1871, 6 Q. B. D. 65). This right flows from the obligation still preserved by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 8, to be ready to pursue felons at the call of the Sheriff and cry of the county. In case of a breach of the peace or affray actually going on in his presence, he may stop it, and arrest the offenders and hand them to a constable (*Timothy v. Simpson*, 1834, 1 C. M. & R. 757, 762). He is also by statute allowed to arrest anyone whom he finds committing an indictable offence between 9 p.m. and 6 a.m. (14 & 15 Vict. c. 19, s. 11); any offence against the Larceny Act, 1861, except angling in the day time (24 & 25 Vict. c. 96, s. 103); and any offences within the Coinage Offences Act, 1871, 24 & 25 Vict. c. 99, s. 31, or the Vagrancy Act, 1824, 5 Geo. IV. c. 83, s. 6, and its extensions and amendments; and is required to arrest rioters not dispersing after the Riot Act has been read (1 Geo. I. st. 2, c. 5, s. 3; *R. v. Pinney*, 1831, 3 St. Tri. N. S. 1). Persons found committing any offence against the Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, s. 61, may be arrested without warrant by the owner of the property damaged, or his servants or persons authorised by him.

A person found committing an offence against the Town Police Clauses

Act, 1847, 10 & 11 Vict. c. 89, s. 13, or the Metropolitan Police Act, 1839, 2 & 3 Vict. c. 45, s. 16, may be arrested without warrant by the owner of the property on or with regard to which the offence was committed, or by his servants or persons authorised by him. And similar provisions are made by the Night Poaching Act, 1828, 9 Geo. IV. c. 69, s. 2, and the Salmon Fisheries Acts, 36 & 37 Vict. c. 71, s. 38; 41 & 42 Vict. c. 39, s. 8. The words "found committing" are, it would seem, to be taken literally, *i.e.* as applying to detection in actual commission of the offence, and immediate pursuit (see *Griffiths v. Taylor*, 1877, 2 C. P. D. 194; *Downing v. Capel*, 1867, L. R. 2 C. P. 461). These decisions were given in cases where the defence—now abolished by 56 & 57 Vict. c. 61—of "not guilty" by statute was pleaded.

Arrest without Warrant by Constables.—A peace officer may, as such, at common law, arrest without warrant—(1) Any person whom he suspects on reasonable grounds of committing a felony, whether a felony has in fact been committed or not (*Marsh v. Loader*, 1850, 14 C. B. N. S. 535); (2) Any person committing a breach of the peace in his presence, at the time of or immediately after the offence (*R. v. Light*, 1857, 27 L. M. J. C. 1). He can also by statute arrest, without warrant, any person whom he finds lying or loitering in any highway, road, or other place during the night, whom he has good cause to suspect of having committed or of being about to commit any felony against the Larceny, Malicious Damage, or Offences against the Person Acts of 1861, 24 & 25 Vict. c. 96, s. 104; c. 97, s. 57; c. 108, s. 66; and ticket-of-leave men whom he suspects of committing any offence (54 & 55 Vict. c. 69, s. 2). Under other Acts he has like powers in the case of street offences (5 & 6 Will. IV. c. 50, ss. 58, 59; 10 & 11 Vict. c. 89, s. 28; 2 & 3 Vict. c. 47, s. 54); disorderly persons or loiterers at night (10 Geo. IV. c. 44, s. 7; 2 & 3 Vict. c. 47, s. 64; 45 & 46 Vict. c. 50, s. 193); and offenders who refuse their names and addresses (2 & 3 Vict. c. 47, s. 63); persons profanely swearing in his presence, if unknown (19 Geo. II. c. 21, s. 3); and see also the Indecent Advertisements Act, 1869, 52 & 53 Vict. c. 18, s. 6; the Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. c. 41, s. 4; and the Prevention of Cruelty to Animals Act, 1849, 12 & 13 Vict. c. 92, s. 13. A person arrested without warrant must not be detained in private custody, but must be taken with all convenient speed to a police station or justice, and charged formally with the offence (42 & 43 Vict. c. 49, s. 38). The extent of the right to break open doors to arrest without warrant is doubtful (2 Hale, P. C., 94; 1 East, P. C., 322; Fost. Cr. L. 322; *Harvey v. Harvey*, 1884, 26 Ch. D. 644). And see BAIL.

Privilege.—A person concerned with business in a Court of law is privileged *eundo morando et redeundo* from arrest on civil process, but not from arrest on a criminal charge (*re Freston*, 1883, 11 Q. B. D. 545), except perhaps in the case of a witness, see 3 Russ. on *Crimes*, 6th ed., 1641.

Resistance and Flight.—Resistance to legal arrest is unlawful (see 3 Russ. on *Crimes*, 6th ed., 70–120, and ASSAULT), and if it leads to death or serious injury, indictable; and where the arrest is of a person found committing an indictable offence in the night, it is punishable under 14 & 15 Vict. c. 19, s. 12. Resistance to the Sheriff in the execution of a writ is a misdemeanour, and the Sheriff may arrest the offender without warrant (50 & 51 Vict. c. 55, s. 8 (2)). No more force than is absolutely necessary must be used by any person acting on behalf of justice, even in a case of resistance. The killing or wounding a fugitive offender is not justifiable, except when his offence is capital and his flight cannot be otherwise stayed (*R. v. Dodson*, 1851, 2 Den. Cr. C. 35; 20 L. J. M. C. 57; 3 Russ. on *Crimes*, 6th ed.,

175). Illegality in the warrant or mode of arrest does not affect the right of the Court to try the prisoner when brought before it (*R. v. Hughes*, 1879, 4 Q. B. D. 614), unless some element essential to create jurisdiction has been omitted (*Dixon v. Wells*, 1890, 25 Q. B. D. 249).

Arrest of Ship.—This is the method of enforcing the Admiralty process *in rem*, whether that process be founded on a maritime lien or on a claim against the ship. In the former case, arrest is allowed, even though the property may have changed hands since the cause of action arose, for "the maritime lien arises from the moment of the circumstances creating it, and not from the date of the intervention of the Court" (*The Pacific*, 1864, Br. & Lush. 243; Dr. Lushington, approved by Fry, L. J., in *The Heinrich Bjorn*, 1885, 10 P. D. 58). In the latter case, arrest is not allowed unless the ship continues in the same hands as at the time when the claim arose.

Process of Arrest.—Arrest is effected under the authority of a warrant issued from the Admiralty registry, after a notice or *præcipe* praying for a warrant, together with an *affidavit to lead warrant*, stating the cause of action, has been filed there. The warrant is directed to the marshal of the Admiralty Division, commanding him or his substitutes to arrest the ship and keep her under safe arrest till further order of the Court. It must be served by the marshal or his substitutes within the jurisdiction, and within a year from the day of its date. The manner of serving it on a vessel is to nail or fix the original warrant for a short time on the main-mast or single mast of the vessel, and then leave a copy in its place.

Extent of Arrest.—An arrest of ship extends to the sails or rigging taken on shore for safe custody, and similar appurtenances of the ship (*The Alexander*, 1812, 1 Dod. 282; *The Dundee*, 1823, 1 Hag. Adm. 124); and also to an increase in value of the ship, owing to repairs being done by the owner at his own expense after the lien attached, but not if they are done by a stranger on the security of a bottomry bond (*The Aline*, 1839, 1 Rob. W. 120). But it will not attach to personal luggage of passengers or the effects of seamen (*The Willem III.*, 1871, L. R. 3 Ad. & Ec. 487). If the cargo is on board, and is proceeded against, either on its own account (as in case of salvage), whether it be named in the warrant or not, or on account of the freight due in respect of it, the arrest of the ship is also an arrest of the cargo and freight (*The Flora*, 1866, L. R. 1 Ad. & Ec. 45), and by freight is meant all freight actually accrued, *i.e.* the gross freight, less proper deductions as agreed by charter (*The Leo*, 1862, Lush. 444). If the cargo has been landed or transhipped, an arrest of ship is not an arrest of cargo, but the cargo must be arrested similarly to the ship, *viz.*, placing the warrant on it for a short time and then leaving a copy in its place. Where it is in custody of any person, the original warrant is shown to him, and a copy left. When the proceeds of the cargo are in Court, the warrant must be served on the Admiralty registrar.

Effect of Arrest.—The arrest binds the whole of the property, whatever its value, to the amount of the claim. After arrest the ship remains in the custody of the marshal, who is responsible for her safety; and anyone interfering with arrested property, without authority from the Court, is liable to attachment (*The Westmoreland*, 1845, 6 N. C. 173). The property arrested, unless bailed, remains under arrest till the action is determined. Property already under arrest can be arrested by a second plaintiff in the same way as by the first; or he can enter a *caveat* in the Admiralty registry against the release of the property. The owner of

property about to be arrested, after giving an undertaking to appear in the action, and give bail or pay money into Court, can get a *caveat* entered against the issue of a warrant of arrest. This does not prevent the property being arrested, but it renders the plaintiff who makes the arrest liable to satisfy the Court that he had good reason for doing so, or his warrant may be discharged, and he may be liable in costs and damages. A defendant who counterclaims against the plaintiff, in respect of a matter for which he could, before the Judicature Act, 1873, have brought an action *in rem* against the plaintiff's property, may arrest the plaintiff's property if he can, after appearing to the plaintiff's action (*The Julia Fisher*, 1876, 2 P. D. 115). An action may be maintained for damages for a wrongful arrest of a ship without proof of actual damage in Admiralty, and also, it seems, at common law, if that wrongful arrest is due to *mala fides* or *crassa negligentia* implying malice (*The Walter D. Wallet* [1893], Prob. 202; Jeune, P., quoting the early authorities).

Re-arrest.—When a ship has been released on bail, that bail is a substitute for her, and is "a security, not for the amount of the claim, but for the value of the property arrested, to the extent of the claim, and costs" (Williams and Bruce, 283). After bail is accepted, if it be inadequate, the ship can, it seems, be re-arrested at any time up to final judgment being given in the cause (which means final judgment after an appeal), and perhaps after that in some cases (*The Dictator* [1892], Prob. 321; *The Flora*, 1865, L. R. 1 Ad. & E. 45); and certainly after final judgment for costs, if the bail is not enough to cover them as well as the damages (*The Freedom*, 1868, L. R. 3 Ad. & E. 495). See BAIL.

Queen's ships, and ships belonging to foreign sovereign governments, and used in their public service, are exempt from arrest (*The Charkieh*, 1873, L. R. 4 Ad. & Ec. 49 and 96; *The Constitution*, 1879, 4 P. D. 39; *The Parlement Belge*, 1880, 5 P. D. 197).

[See Williams and Bruce, *Practice*.]

Arsenal.—1. Under the Dockyards, etc., Protection Act, 1772 (12 Geo. III. c. 24), it is felony, punishable by death, subject to a power of recording the sentence (under 4 Geo. IV. c. 48), to burn or otherwise destroy any royal arsenal or magazine, or any military or naval stores therein, or any place in which any such stores are kept, in the United Kingdom, or any island, country, fort, or place thereunto belonging. The offence may be tried anywhere in the United Kingdom, or wherever the Crown deem most expedient in the interests of justice.

2. Under the Official Secrets Act, 1889 (52 & 53 Vict. c. 52), disclosure of official information as to a royal arsenal, or making drawings of it, without authority by or on behalf of Her Majesty, is a misdemeanour, wherever committed in the British Empire, or by a British officer or subject outside it.

Arson.—1. Arson at common law was the burning of the house of another wilfully and of malice aforethought (*ædes alienas voluntarie et ex malitia præcogitata comburere*). It was a felony, punishable by death (Stephen, *Hist. Crim. Law*, i. 476), and the first offence as to which the law took special notice of the question of *mens rea* or criminal intent (Pollock and Maitland, *Hist. Eng. Law*, ii. 490; Stephen, *Hist. Crim. Law*, iii. 188; 3 Co. Inst. 66; Hawk., P. C., bk. i. c. 39).

2. To burn one's own house was a misdemeanour at common law, if damage was thereby caused to other houses (Hawk., P. C., bk. i. c. 39, s. 15). Incendiarism is now regulated almost wholly by the Malicious Damage Act, 1861, 24 & 25 Vict. c. 97.

3. It is felony, still punishable by death, wilfully and maliciously to set fire to any Queen's ship, royal dockyard, or arsenal, or materials therein (12 Geo. III. c. 24, s. 1; 7 & 8 Geo. IV. c. 28, ss. 6, 7) in any part of the Queen's dominions. The sentence of death can be recorded (4 Geo. IV. c. 48). The offence is also capital, and triable by court-martial, when committed by a person subject to naval discipline (29 & 30 Vict. c. 119, s. 34). See ARSENAL; COURTS-MARTIAL.

4. It is felony punishable by penal servitude for life, or not less than three years, unlawfully and maliciously to set fire to (a) a place of divine worship (24 & 25 Vict. c. 97, s. 1); (b) a dwelling-house, any person, even the incendiary, being therein (s. 2, *R. v. Pardoe*, 1894, 17 Cox C. C. 715); (c) buildings belonging to railways, ports, docks, or harbours, or any navigation (s. 4); (d) buildings belonging to the Crown, any local authority, university, or college thereof, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription (s. 5); (e) crops cut or standing, of any cultivated vegetable produce, and growing woods, plantations, heath, gorse, or fern (s. 16); (f) stacks of any cultivated vegetable produce, or of wood, bark, coal, charcoal, heath, gorse, fern, or peat (s. 17, *R. v. Satchwell*, 1872, L. R. 2 C. C. R. 21); (g) coal mines (s. 26); or (h) ships or vessels (s. 42).

5. It is felony punishable by penal servitude for life, or not less than three years, unlawfully and maliciously to set fire (a) to any building used for domestic, manufacturing, commercial, or agricultural purposes, with intent to injure or defraud any person, whether the owner of the property or not (ss. 2, 58, 59, 60; *R. v. Newbould*, 1872, L. R. 1 C. C. R. 344); or (b) to any vessel, with intent to injure or defraud the owner, or any part owner of the vessel, or of any goods on board, or of persons who have insured vessel, freight, or goods (s. 43).

6. It is also felony, punishable by penal servitude from three to fourteen years, unlawfully and maliciously to set fire (a) to any building not enumerated above (s. 5), including an unfurnished house (*R. v. Manning*, 1872, 41 L. J. M. C. 11); (b) any matter or thing in, under, or against, any building, under such circumstances that, if the building were thereby set on fire, it would be felony (s. 7, *R. v. Heseltine*, 1873, 12 Cox C. C. 404; *R. v. Child*, 1871, L. R. 1 C. C. R. 307; *R. v. Natrass*, 1882, 15 Cox C. C. 73; *R. v. Harris*, 1882, 15 Cox C. C. 75; *R. v. Batstone*, 1864, 10 Cox C. C. 20).

7. It is a misdemeanour, punishable by penal servitude from three to fourteen years, unlawfully and maliciously to attempt, by an overt act, to set fire (a) to any building (s. 8), (b) to any mine (s. 27), to any ship or vessel (s. 44), under such circumstances, that if the building, mine, or vessel were set on fire, the offender would be guilty of felony.

8. It is also a misdemeanour, punishable by penal servitude from three to seven years, unlawfully and maliciously to attempt, by any overt act, to set fire to crops or stacks (24 & 25 Vict. c. 97, s. 18).

9. The uttering, sending, or delivering of written threats to burn houses, buildings, ships, or agricultural produce, is a felony punishable by penal servitude from three to ten years (24 & 25 Vict. c. 97, s. 50).

The punishment of the offences 4 to 9 is regulated, as to penal servitude, by the sections constituting each offence and the Penal Servitude Act 1891, 54 & 55 Vict. c. 69, s. 1. Persons convicted of any of the offences may alternatively be sentenced to imprisonment, with or without

hard labour, for not more than two years, and if males under sixteen (see the sections) may be sentenced to whipping, in addition to the term of penal servitude or imprisonment. Offences 6, 7, 8, 9 are triable at Quarter Sessions (see 5 & 6 Vict. c. 38, s. 1).

10. If any person is burnt in consequence of the commission of any of the above offences, the offender is liable to conviction for murder (*R. v. Serné* (No. 1), 1887, 16 Cox C. C. 311). After trial and acquittal for murder in such a case, the accused can be re-tried for arson on the same facts (*R. v. Serné* (No. 2), 1887, 107 Cent. Crim. Ct. Sess. Paper, 418).

For the purpose of all these offences the fire must be lit deliberately without any *bond fide* claim of right (*R. v. Twose*, 1879, 14 Cox C. C. 327), and not by negligence or accident (*R. v. Faulkner*, 1877, 13 Cox C. C. 550); and to constitute a completed felony, there must be more than a mere scorching, some actual ignition, blaze, or charring (*R. v. Parker*, 1839, 9 Car. & P. 45; *R. v. Russell*, 1842, C. & M. 541.) On indictment for any of the felonies the jury may convict of the attempt (14 & 15 Vict. c. 100, s. 9). See also EXPLOSIVE.

[See 3 Russ. on *Crimes*, 6th ed., 781, 792, 796-7, 810, 820-823, 959-975; Arch. Cr. Pl., 21st ed., 583, 602; Stephen, *Dig. Crim. Law*, 5th ed., arts. 417, 419-421; Fost., 2nd ed., 113-116, 192, 333, 334; Hawk., P. C., bk. i. c. 39.]

Art, Schools for Science, etc.—See EDUCATION.

Art, Works of, Destroying.—See MALICIOUS DAMAGE.

Art Union.—Voluntary associations formed before the Act for legalising Art Unions, 9 & 10 Vict. c. 48, for the purchase of paintings or other works of art, to be distributed by chance or otherwise, or as prizes among the subscribers, and similar associations formed subsequently, are, by the Act referred to, declared to be lawful associations, notwithstanding the Lottery Laws, if the society be constituted by royal charter, or its deeds of constitution and rules be approved by the Privy Council. The best known society under the Act is the Art Union of London, which was incorporated by charter in 1846, for the advancement of art and the encouragement of artists. The more important rules of the society are set out in the report of the *Overseers of the Savoy v. The Art Union of London* [1894], 2 Q. B. 609; [1896], App. Cas. 296. In the case cited it was ultimately decided that the buildings of the society are not exempted from rates, because subscriptions by which the society is supported, being given for value, are not "voluntary" within the meaning of 6 & 7 Vict. c. 36, s. 1.

Articled Clerk.—See APPRENTICE; INFANT; NOTARY; SOLICITOR.

Articles.—In criminal proceedings in the Ecclesiastical Courts, the first plea is termed the articles, because in form it runs in the name of the judge who articles and objects the facts charged against the defendant. In plenary causes (*q.v.*), not criminal, the first plea is termed the libel (*q.v.*), and runs in the name of the party, or his proctor, who alleges and propounds the facts founding the demand (Rogers, *Ecclesiastical Law*, p. 653). Where

the ordinary has allowed his office—i.e. the office of the judge is promoted—the whole transaction must be fairly and specifically stated, to enable the defendant to give an affirmative issue. The general words of articles are construed only to include subordinate charges, *ejusdem generis*, with the principal. It is not a fatal objection that the articles are exhibited in the name of the surrogate and not of the judge, or in the name of the bishop instead of his official (*q.v.*); but where the office of the judge is wrongly described, the error is fatal, and may be pleaded in bar of further proceedings (Phillimore, *Ecclesiastical Law*, 2nd ed., 991).

Articles of Association.—See COMPANY.

Articles of Partnership.—See PARTNERSHIP.

Articles of the Peace.—A complaint made or exhibited by any person to the High Court, or a Court of Assize, or Quarter Sessions, or Court of Summary Jurisdiction, setting out that the complainant fears, with just and reasonable cause, that another person will do or cause to be done to him (or, it would seem, to his wife or child) some bodily harm, or will burn his house. The articles must be verified by the oath of the complainant; and the person incriminated may not answer or controvert the allegations contained in the articles (*R. v. Dunn*, 1840, 12 Ad. & E. 599; nor supplement omissions therein, nor can he show cause why the articles should not be discharged (*R. v. Mallinson*, 1851, 16 Q. B. 367). The Court, if satisfied that upon the face of the articles there are reasonable grounds of fear, are bound *ex officio* to require sureties for the peace (*Lort v. Hutton*, 1876, 45 L. J. M. C. 95). The High Court may require sureties where an inferior Court has refused them (*R. v. Mallinson*, 1851, 16 Q. B. 367, or quash an order for sureties made on insufficient grounds, by an inferior Court (*R. v. Dunn*, 1840, 12 Ad. & E. 599).

Articles of the peace are distinct from applications to order sureties for good behaviour, and the power to grant them is distinct from that under which Courts act in requiring persons, on *conviction*, to give security of the peace or good behaviour. See GOOD BEHAVIOUR; SURETIES OF PEACE.

The procedure is of a special or exceptional character, being what has been termed a branch of preventive justice (4 Black. Com. c. 18), in the nature of a *quia timet* suit in a criminal case, to obtain security against future breaches of the peace. See QUIA TIMET.

Jurisdiction.—The jurisdiction of justices of the peace, to require sureties to keep the peace, rests upon immemorial usage, as established by judicial decisions (see *R. v. Justices of Queen's County*, 1882, 19 L. R. Ir. 294, 301). Its origin is variously assigned to—(1) the powers inherited from conservators of the peace; (2) the statutes 34 Edw. III. c. 1, and 3 Hen. VII. c. 2; and (3) the commission of the peace, which may, perhaps, be read as contemporary or traditional expositions of the Act of Edw. III. The commission of the peace for counties, as settled by Sir Christopher Wray in 1590, and re-settled and modernised under the Crown Office Act, 1877, 40 & 41 Vict. c. 41, contains the following provisions:—

“Know ye that we have assigned you, jointly and severally, and every one of you our justices, to keep our peace, etc., and to cause to come before you, or any one of you, all those who to any one or more of our people, con-

cerning their bodies or the firing of their houses, have used threats, to find sufficient security for the peace or their good behaviour towards us and our people (Arch. Q. S., 4th ed., 22). If they shall refuse to find such security, then them in our prisons, until they shall find such security, to cause to be safely kept."

The jurisdiction may be exercised at Quarter Sessions or at Petty Sessions, or by a single justice (42 & 43 Vict. c. 49 s. 25). The High Court as successor of the Courts of Queen's Bench and Chancery, is held always to have had, as conservators of the peace (independently of 34 Edw. III. c. 1, and the commissions of the peace), original jurisdiction to receive articles of the peace, as well as supervisory jurisdiction over the acts of ordinary justices. This jurisdiction has been recognised by statute as to England (21 Jac. I. c. 8, s. 1), and as to Ireland (10 & 11 Car. I. c. 10, Ir.); and see *Ex parte Seymour v. Davitt*, 1883, 12 L. R. Ir. 46. Under the common law or usage, there was no limit to the period for which the accused could be required to give security for the peace (in the Court of King's Bench, *R. v. Bowes*, 1787, 1 T. R. 696; 1 R. R. 363), or it would seem in a Court of Assize or Quarter Sessions, or even before a single justice (*Willes v. Bridger*, 1819, 2 Barn. & Ald. 278; 20 R. R. 434; *Prickett v. Greatrex*, 1846, 8 Q. B. 1021). But it was unusual to exceed one year, unless a longer term seemed essential to subserve the ends of justice.

Procedure.—The procedure in the Queen's Bench Division of the High Court is regulated by the Crown Office Rules, 1886, rr. 280–290 (and see Short and Mellor, *Crown Office Practice*, 417). The Court of Chancery also had jurisdiction (21 Jac. I. c. 8, s. 1). But no application for the exercise of original jurisdiction, by any branch of the High Court or Court of Assize, has been made since the Judicature Acts. It is said that these Courts alone have jurisdiction, where the person ought to be bound is peer or peeress (Hawk., P. C., 7th ed., bk. i. c. 60, ss. 5, 8). Dalton, c. 117, puts this upon "the opinion which the law hath of the peaceable disposition of noblemen." As to procedure before Courts of Quarter Sessions, see Arch., *Quarter Sessions Practice*, 4th ed., 612–616. It is now rarely employed, since under sec. 25 of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, it is provided that the power of a Court of summary jurisdiction, on complaint of any person, to adjudge a person to enter into a recognisance and find sureties to keep the peace, or to be of good behaviour toward such first-named person, shall be exercised by order upon complaint, and the complainant and defendant and witnesses may be examined and cross-examined, and the complainant and defendant shall be liable to costs, as in the case of any other complaint. An order under this section can be varied (42 & 43 Vict. c. 49, s. 26; Summary Jurisdiction Rules, 1886, r. 17). Since the passing of the Act, the old practice by which a justice bound the defendant by recognisance to answer to the articles at the Sessions (see 7 Geo. IV. c. 64, s. 31; 16 & 17 Vict. c. 30, s. 2) has fallen into disuse. If the defendant refuses or fails to find the required security, he may be imprisoned for not more than six months by a Petty Sessional Court, or than fourteen days by any other Court of summary jurisdiction, including a single justice (42 & 43 Vict. c. 49, s. 25, superseding 16 & 17 Vict. c. 30, s. 3).

Recognisances.—The recognisance to keep the peace is by bond, in favour of the Crown (see BAIL). If the conditions are broken, and the obligor convicted, the recognisances may be estreated or put in process—(1) In the High Court, by order of the Court on notice to the obligor (Cr. Off. Rules, 1886, r. 128); (2) In Courts of Quarter Sessions, in the case of recognisances there taken, or returned thither, under 3 Henry VII. c. 2, by order of the Court

(7 Geo. iv. c. 64, s. 3; 16 & 17 Vict. c. 30, s. 2); (3) In Courts of summary jurisdiction, under sec. 9 of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49.

[For authorities on the subject, see Lambard, *Eirenarcha*; Hawk., P. C., bk. i. c. 60; Dalton, *Country Justice*, cc. 116–122; 4 Black. Com. c. 18; Arch., *Quarter Sessions Practice*, 4th ed., pp. 609–616; and Burn's *Justice*, 13th ed., vol. v., "Sureties of Peace."]

Articles of War.—See WAR.

Articles, The Thirty-Nine.—The Thirty-Nine Articles of religion, "for the avoidance of diversities of opinions and for the establishing of consent concerning true religion," were agreed upon by the archbishops and bishops of both provinces, and the whole clergy in convocation, in the year 1562, and put forth by Queen Elizabeth's authority. They were ratified by the Convocation of Canterbury, with the Queen's consent, in 1571. The same year the Statute 13 Eliz. c. 12, for the first time, required subscription to them on the part of ecclesiastical persons; and by sec. 2 (which is still in force) provided the penalty of deprivation for advisedly maintaining or affirming any doctrine directly contrary or repugnant to them. Canon 5 of 1603 declares *ipso facto* excommunicate, those who affirm that any of the Articles are in any part superstitious or erroneous. But these canons do not *proprio vigore* bind the laity (*Middleton v. Crofts*, 1736, 2 Atk. 650). In 1623, James I. again ratified and confirmed the Articles. "His Majesty's Declaration," while claiming the King to be supreme governor of the Church of England, expressly recognises the constitutional position of the two Convocations. It would be obviously foreign to the purpose of the present work to enter upon any discussion of the history or theology of the Articles. They present, in the language of the time, not an entire system of theology, but rather what the Church of England synodically held to be a fair scriptural statement of the cardinal tenets of Christianity. Legally, they may be considered, as far as they go, to be a definition of the doctrines of the Church of England. In the words of Lord Stowell, sitting in the Consistory Court of London: "They were framed by the chief luminaries of the reformed Church, with great care, in Convocation, as containing fundamental truths, deducible, in their judgment, from Scripture; and the Legislature has adopted them and established them, as the doctrines of our Church, down to the present time. . . . I think myself bound, at the same time, to declare that it is not the duty nor the inclination of this Court to be minute and rigid in applying proceedings of that nature [*i.e.*, under 13 Eliz. c. 12], and that, if any Article is really a subject of dubious interpretation, it would be highly improper that this Court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation" (*The King's Proctor v. Stone*, 1808, 1 Hag. Con. 424. See also *Heath v. Burder*, 1862, 15 Moo. P. C. C. 1; *Voysey v. Noble*, 1871, 1. R. 3 P. C. 357).

The legal duty of the clergy to subscribe and declare assent to the Articles is now regulated by the Clerical Subscription Act, 1865, 28 & 29 Vict. c. 122, and Canon 36 of 1603, as revised by the convocations, under royal licence, in 1865. It is believed that the only laymen on whom the duty now rests are—

1. Judges ecclesiastical (*i.e.* chancellors, commissaries, and officials), under

Canon 127 of 1603. But see *Dale's case*, 1881, 6 Q. B. D. 376, as to this canon not affecting the title of the judge of the provincial courts, appointed under the Public Worship Regulation Act, 1874, to have become statutable official principal of the Arches Court of Canterbury:

2. "Any governor or head of the colleges of Westminster, Winchester, and Eton" (whether in holy orders or not) under the Caroline Act of Uniformity (14 Car. II. c. 4, s. 13), this part of the section being unaffected by the Public Schools Act, 1868, 31 & 32 Vict. c. 118, or by the Universities Tests Act, 1871, 34 & 35 Vict. c. 26. But as to a college in the University of Oxford, founded since the last-named Act, see *R. v. Hertford College*, 1878, 3 Q. B. D. 693.

Artificial Stream.—This expression is used to denote that class of watercourses which are not natural, and therefore are not invested with natural rights and corresponding obligations. It includes such watercourses as drains, streams dug through land for the supply of water to a mill or engine, canals and water pumped from a mine. Generally it is apparent, from the condition of a stream, whether it is to be classed as natural or artificial, but it sometimes happens in the case of ancient watercourses that it is almost impossible to decide to which class they belong; and they may sometimes be of such a character, that, though artificial in reality, they may have been so made, and of such a permanent nature, as to be considered natural for the purpose of the respective rights and obligations of riparian owners. As a general principle, it has been laid down that an artificial stream is one that arises by the agency of man, or, though arising from natural causes, flows in a channel made by man. Easements may be acquired in artificial streams, either by grant or by prescription, either at common law or under the Prescription Act (2 & 3 Will. IV. c. 71, s. 2). See EASEMENTS; WATERCOURSE. See also Goddard on *Easements*; Gale on *Easements*.

Artisans.—During the present reign various statutes have been passed with the object of opening up densely-crowded and unhealthy areas, and of securing to the artisan class houses of an improved character from a sanitary point of view. These enactments have all practically been repealed, but, with additions, reproduced in one general consolidating statute, "The Housing of the Working Classes Act, 1890." This Act has three main divisions, dealing respectively with unhealthy areas, unhealthy dwelling-houses, and working-class lodging-houses.

Part i. (which has no application to rural sanitary districts) deals with unhealthy areas. It provides (s. 4) that, where a medical officer of health makes an official representation (in writing, s. 79) to a local authority that, within a certain area, either (a) any houses, courts, or alleys are unfit for human habitation, or (b) that the narrowness, closeness, or bad arrangement of the streets and houses, or groups of houses, are, by sanitary defects, dangerous or injurious to the health of the inhabitants of these or adjoining houses, and that the evils connected therewith cannot be effectually remedied otherwise than by an improvement scheme for the rearrangement and reconstruction of the streets and houses within such area, or some of them, the local authority shall take such representation into consideration, and, if satisfied of its truth, and of the sufficiency of their resources, shall pass a resolution to the effect that such area is an unhealthy area, and that

an improvement scheme ought to be made. Such local authority is thereupon required to make a scheme, and it is provided that any number of such areas may be included in one scheme. In the case of a representation being made to the London County Council, relating to not more than ten houses, the council are not to proceed under this part of the Act, but are to direct their medical officer of health to represent the case to the local authority under part ii., and any disputes between the London County Council and a local authority, as to the limits of the area to be dealt with, are to be decided by an arbitrator appointed by a Secretary of State (ss. 72-73). An improvement scheme must be accompanied by the necessary documents to show how it is to be worked out in detail, and it must further provide, if it comprises an area within the county or city of London (unless a dispensation is granted by a Secretary of State), but not elsewhere (unless required by the Local Government Board), for the accommodation of the persons displaced by the scheme (s. 11). After due notice of the completion of the scheme has been given (s. 7), the local authority are to present a petition for an order confirming the same; the confirming authority being a Secretary of State if the area in question is within the county or city of London, and the Local Government Board if the area is situated elsewhere. If the confirming authority think fit to proceed with the scheme, they are to direct a local inquiry, due notice whereof must be given (s. 18). The officer conducting such inquiry is empowered to administer oaths (s. 19); and, after receiving his report, the confirming authority may make a provisional order, declaring the limits of the area comprised in the scheme, and authorising such scheme to be carried into execution (s. 8, subs. 4). The provisional order, which has no validity unless and until confirmed by Act of Parliament (s. 8, subs. 6), must be served upon the persons to be affected by it, except tenants for a month or a less period (s. 8, subs. 5). When a provisional order is confirmed, the local authority are to carry out the scheme; for this purpose they may sell or let all or any part of the land to be acquired, or they may engage with any body of trustees, society, or person, or, without themselves acquiring the land, they may contract with the person entitled to the first estate of freehold for carrying the scheme into effect. In any grant or lease of the land appropriated by the scheme for the erection of dwelling-houses, suitable conditions and restrictions must be inserted as to the elevation, size, sanitary arrangements of the houses, as well as a prohibition against division of the buildings (s. 12). The local authority, without the express approval of the confirming authority, are not permitted themselves to undertake the rebuilding of the houses, or the execution of any part of the scheme, except that they may demolish the houses, clear the sites, and lay-out, pave, sewer, and complete the streets (s. 12, subs. 3); if the local authority erect any dwellings out of funds provided by this part of the Act, they are required, unless the confirming authority otherwise determines, to sell and dispose of the same within ten years from their completion (s. 12, subs. 5). Secs. 20, 21 and the second schedule (which incorporate with certain modifications the Lands Clauses Acts) provide for the taking of land compulsorily, and establish the principle upon which compensation is to be assessed. Sec. 22, which provides for the extinction of rights of way and other easements, includes the easement of ancient lights (*q.v.*) even where only in process of acquisition (*Barlow v. Ross*, 1890, 24 Q. B. D. 381). But before taking any fifteen or more houses, for the purposes of the Act, notice of an intention to do so must be duly given not less than thirteen weeks previously (s. 14); and for the purpose of providing accommodation for those displaced,

lands may be appropriated (s. 23). For carrying out the scheme a dwelling-house improvement fund is to be formed (s. 24), and borrowing powers are conferred (s. 25). Provision is made for the case of failure or neglect on the part of medical officers of health, or local authorities, to perform their statutory duties (s. 5, subs. 2; ss. 10, 13, 16); and power is given to the confirming authorities to issue forms of advertisements and notices. (For these forms, see *Statutory Rules and Orders* for 1890, pp. 733-739.)

Part ii. of the Act has a more limited scope than part i.; it deals with unhealthy dwelling-houses as distinguished from unhealthy areas. Provision is made for the closing and demolition of houses which are unfit for human habitation, and for dealing with houses which, although not in themselves unfit for human habitation, yet so obstruct light or air as to make adjoining houses unhealthy. A right of appeal is given to persons aggrieved (see AGGRIEVED), and provision is further made for improvement schemes, and for the compulsory acquisition of land for the purpose.

Part iii., which relates to working-class lodging-houses, is adoptive. See ADOPTIVE ACT. It may be adopted by local authorities generally, except rural sanitary authorities, which are only empowered to adopt it upon obtaining a certificate enabling them to do so from the county council in whose area the scheme is proposed to be carried out (s. 55). The expression "lodging-houses for the working-classes" is defined (s. 53) as including "separate houses or cottages for the working-classes, whether containing one or several tenements;" the expression "cottage" may also include a garden of not more than half an acre, provided that its estimated annual value does not exceed £3. Local authorities may acquire, erect, and manage such lodging-houses for the working-classes (ss. 57-62). A tenant or occupier, or the husband or wife of a tenant or occupier, of such a lodging-house who is in receipt of parochial relief, other than merely temporary relief, is disqualified from continuing to be a tenant or occupier (s. 63). Facilities are also given to railway and other public and trading companies for the erection of dwelling-houses for the working-classes in their service (ss. 67, 68); and to gas and water companies for supplying gratuitously, or on favourable terms, gas and water to working-class lodging-houses (s. 69).

Part iv. contains various supplementary provisions. Sec. 75 is important; it provides that "in any contract made after 14th August 1885 for letting for habitation by persons of the working-classes a house, or part of a house, there shall be implied a condition that the house is, at the commencement of the holding, in all respects reasonably fit for human habitation. In this section the expression 'letting for habitation by persons of the working-classes' means the letting for habitation of a house, or part of a house, at a rent, not exceeding in England the sum named as the limit for the composition of rates by sec. 3 of the Poor Rate Assessment and Collection Act, 1869 (i.e. for London, £20; Liverpool, £18; Manchester and Birmingham, £10; elsewhere, £8), and in Scotland or Ireland, £4." In *Walker v. Hobbs & Co.*, 1889, 23 Q. B. D. 458, it was decided, on the corresponding section of the Housing of the Working Classes Act, 1885, that a tenant has, under the section, a right to sue his landlord for damages in respect of injuries caused by the premises not being reasonably fit for human habitation, owing to any defective state of repair. See APARTMENTS; LODGING-HOUSES.

Parts v. and vi. apply the Act to Scotland and Ireland.

The Local Government Act, 1894, by s. 6, subs. 2, enables parish councils to make complaints under the above Act.

The Working Classes Dwellings Act, 1890, grants facilities for gifts of land or personal estate to be laid out in land, for the purpose of providing

dwellings for working-classes in any populous places (see CHARITIES; MORTMAIN).

Sec. 3 of the Cheap Trains Act, 1883, enables the Board of Trade and the Railway Commissioners to make orders requiring railway companies to run, where necessary, a sufficient number of workmen's trains, for workmen going to and returning from their work, at such fares and at such times between six P.M. and eight A.M. as appear reasonable. See CHEAP TRAINS; ALLOTMENTS.

Artistic Work.—See COPYRIGHT (INTERNATIONAL) and LITERARY AND ARTISTIC WORK. "Artistic property" is another phrase, borrowed from the French, to describe copyright in works of art.

As Customary.—See AFFREIGHTMENT (*Construction of Contract*).

As of Right.—See EASEMENTS (ACQUISITION OF).

Ashpits.—The expression "ashpit" in the Public Health Acts and the Public Health Acts Amendment Act, 1890, 53 & 54 Vict. c. 59, includes, for the purposes of the execution of these Acts, any ashtubs or other receptacles for the deposit of ashes, foul matter, or refuse (Public Health Acts Amendment Act, 1890, s. 11 (1)). By s. 35 of the Public Health Act, 1875, every newly-erected house must have an ashpit, furnished with proper doors and coverings; s. 36 empowers the local authority, if a house is without a sufficient ashpit, to require the owner or occupier to provide one, and by s. 306 the owner may be empowered to enter for such purpose when the occupier prevents him.

An ashpit must be constructed and kept so as not to be a nuisance (*q.v.*) or injurious to health, and provision is made for the abatement of a nuisance arising from any defect in an ashpit (ss. 40 & 41). Regulations for the cleansing of ashpits are contained in ss. 42-44. Sec. 91 and following sections deal with nuisances, and any ashpit so foul or in such a state as to be a nuisance or injurious to health, is declared to be a nuisance, liable to be dealt with summarily, in the manner provided by the Act. In common, however, with the other nuisances enumerated in the section, it may be remedied by ordinary legal proceedings, as well as under the Act, provided that no person shall be punished for the same offence both under the Act and under any other law or enactment (s. 111, subs. 340 & 341).

Asportation.—See THEFT.

Assart.—To change forest land into arable or pasture. No tenant of lands within a forest could assart them without the king's licence; if he did, they were seized into the king's hands until redeemed by a fine, assessed according to the value of the property assarted. A licence to assart could be obtained after a writ of *ad quod damnum* (*q.v.*); if the licence were granted, an annual rent was usually reserved, called an assart rent. An assart made upon the king's demesne lands within a forest was

punished by a fine assessed at double the rate of a fine in the case of an assart made upon private lands.

[*Vide* Manwood, *Forest Laws*, 5th ed., 1741, pp. 19–23.]

Assault is a threat, otherwise than by words, of using force to another, accompanied by a real or apparent capacity to carry out the threat at once, or an attempt to use such force (3 Russ. on *Crimes*, 6th ed., 304; Mayne, *Criminal Law of India*, 1896, p. 500). It is almost invariably coupled with battery, which involves the actual use of force, without the consent of the person to whom it is applied (*R. v. Lock*, 1872, L. R. 2 C. C. R. 10), or in cases where assent to the use of force is illegal (*R. v. Coney*, 1882, 8 Q. B. D. 66). And see BATTERY.

A common assault is punishable summarily by fine not exceeding (with costs, if ordered) £5, or imprisonment, with or without hard labour, for not more than two months (24 & 25 Vict. c. 100, s. 42), or upon indictment by imprisonment, with or without hard labour, for not more than one year (s. 47). Aggravated assaults on females or boys under fourteen can be summarily dealt with by fine not exceeding with costs £20, or imprisonment, with or without hard labour, not exceeding twelve months. The accused can elect to be tried on indictment (42 & 43 Vict. c. 49, s. 17), and in the case of girls under sixteen or boys under fourteen, the Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. c. 41, is applicable. (See ACQUITTAL) And where an assault is indecent or is accompanied by an attempt to commit felony, the jurisdiction of the justices is ousted (24 & 25 Vict. c. 100, s. 46). An assault causing actual bodily harm, if tried on indictment, is punishable by penal servitude for not less than three nor more than five years, or imprisonment with or without hard labour for not more than two years (s. 47; 54 & 55 Vict. c. 69, s. 1 (1)).

Assaults on (a) officers of the High Court in the execution of their duty, are punishable as contempt of Court; and (b) on bailiffs of County Courts in the execution of their duties, are punishable by a fine of £5 (51 & 52 Vict. c. 43, s. 48) by the judge of the Court or a Court of summary jurisdiction (*Lewis v. Owen* [1894], 1 Q. B. 102).

A defendant convicted on indictment of assault may be ordered, in addition to his sentence, to pay the costs of the prosecution (24 & 25 Vict. c. 96, ss. 74, 75), and if the assault is felonious, may also be ordered to pay compensation (33 & 34 Vict. c. 23, s. 3).

Assault with intent to rob is a felony (24 & 25 Vict. c. 96, ss. 42, 43).

The following assaults are indictable misdemeanours:—(1) With intent to commit felony, other than murder or robbery (24 & 25 Vict. c. 100, s. 38); (2) On constables in the execution of their duty (same sec.), also punishable summarily (34 & 35 Vict. c. 112, s. 12; 48 & 49 Vict. c. 75, s. 2); (3) On clergymen in discharge of their duties (24 & 25 Vict. c. 100, s. 30); (4) On magistrates protecting wrecks (s. 31). As to assaults on females or males, with sexual objects, see ABOMINABLE CRIME; RAPE. As to assaults in labour disputes, see TRADE UNION. As to civil remedies for assault, see TRESPASS TO THE PERSON.

Assay.—To determine the fineness of the metals of the coinage, and of gold and silver plate, in relation to the standard specified by law.

Gold coins must be eleven-twelfths fine gold to one-twelfth of alloy; silver coins thirty-seven-fortieths fine silver, and three-fortieths alloy. A

remedy allowance for variation is provided (Coinage Acts, 1870, 1891, 33 Vict. c. 10, and 54 & 55 Vict. c. 72, schedules); and the trial of the Pyx is to be made at least once a year. For various Acts as to assaying gold and silver plate, see preamble to 12 Geo. II. c. 26, 1738, which provided that no plate should be made, sold, exchanged, or exported, unless, if gold, it should be marked as of 22 carats, and if of silver of 11 oz. 2 dwts. per lb. troy. The marks were to be the worker's mark, the London Goldsmith's Company's mark, namely, the leopard's head, the lion passant, and the year mark; or, at certain provincial towns, the worker's mark, and the appointed town marks. If the silver were of 11 oz. 10 dwts. fineness, then with the worker's mark, and the Company's mark of the lion's head erased, the figure of Britannia and the year mark; or, in the provincial towns, with the appointed town marks.

Sec. 6 exempted certain small articles. By sec. 5 of 24 Geo. III. s. 2, c. 53, 1784, the king's head was to be added. By sec. 2 of 38 Geo. III. c. 69, 1798, the standard for gold plate was reduced to 18 carats; the new mark for that quality to be a crown, and the figure 18 instead of the lion passant. Sec. 1 of 17 & 18 Vict. c. 96, 1854, enacts that by order in council gold plate may be wrought of any standard, not being less than one-third part of fine gold. Existing standards and marks are not otherwise affected.

Wedding rings are exempted from this Act, by 18 & 19 Vict. c. 60, 1855. See also Revenue Act, 1883, 46 & 47 Vict. c. 55, s. 10; 47 & 48 Vict. c. 62, s. 4; and, as to exemption from assay of certain foreign plate, 47 & 48 Vict. c. 62, s. 4. See COIN; COINAGE.

Assembly, Unlawful.—The offence of unlawful assembly is described in 1 Hawk., P. C. c. 28, s. 4, subs. 9, as follows:—"An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembled together with an intent to do a thing which, if it were executed, would make them rioters (see RIOT), but neither actually executing it nor making a motion towards the execution of it. But this seems to be much too narrow a definition. For any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the king's subjects, seems to be properly called an unlawful assembly," etc. Earlier definitions will be found in the note to *R. v. Hunt*, 1820, 1 St. Tri. N. S. p. 434, one of the earliest references being in Y. B., 3 Hen. VII., where it is said that assemblies, lawful at the commencement, are not punishable unless *in terrorem populi domini regis*. The Criminal Code Commissioners suggest that the law was first adopted at a time when it was the practice for the gentry who were on bad terms with one another to go to market at the head of bands of armed retainers (2 Steph. Hist. Cr. L. 385). Stephen, Dig. Cr. L. art. 75, defines an unlawful assembly as "an assembly of three or more persons (a) with intent to commit a crime by open force; (b) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly ground to apprehend a breach of the peace." This definition is supported by numerous authorities. Some doubt was expressed in *R. v. Dewhurst*, 1820, 1 St. Tri. 530, as to whether to constitute the offence, an apprehension of an immediate breach of the peace must be proved. This would appear not to be necessary; for a class of cases such as *R. v. Hunt*, 1820, 1 St. Tri. N. S. 171; *Redford v. Birley*, 1822, *ibid.* 1072; *R. v. Fussell*, 1848, 6 St. Tri. N. S. 723; *R. v. Ernest Jones*, 1848, *ibid.* 783; but see *R. v. Burns*, 1887, 16 Cox

C. C. 355—have decided that a meeting with intent to raise discontent and disaffection, and excite hatred and contempt of the Government and Constitution, or to excite resistance to law, are unlawful assemblies; and the Irish Courts, in *O'Kelly v. Harvey*, 1883, 15 Cox C. C. 435, have expressed the opinion that so is a meeting to promote an unlawful conspiracy with regard to the payment of rent. None of the judicial references would appear to amount to an exact and exhaustive definition. Compare the charge of Alderson, B., at the Monmouth Assizes, 1839 (3 St. Tri. 1353), and his summing up in *R. v. Vincent*, 1839, *ibid.* 1037. In *Beatty v. Gilbanks*, 1882, 9 Q. B. D. 308, it was held that a peaceful meeting of the Salvation Army was not an unlawful assembly merely because there was good reason to believe that it would lead to a breach of the peace on the part of the opponents of the Army, who would endeavour to break it up. This case has been criticised by the Irish Court of Appeal in *O'Kelly v. Harvey*, 1883, 15 Cox C. C. 576.

A meeting to witness a prize-fight has been held to be an unlawful assembly (*R. v. Perkins*, 4 Car. & P. 537), but those present and countenancing it are also guilty of aiding and abetting an assault (*R. v. Coney*, 1882, 8 Q. B. D. 535). As to the offence of taking part in an unlawful assembly, it has been ruled that, if the purposes are unlawful, everyone who, after being aware of those purposes, attends as a partisan, without taking steps to counteract such purposes, is guilty of taking part in an unlawful assembly. A meeting may be lawful as to some purposes, unlawful as to others; lawful as to one period of time, and unlawful as to another (*R. v. Dewhurst*, 1820, 1 St. Tri. N. S. 530).

An unlawful assembly may be dispersed by force, without waiting until it has become a riot or the Riot Act has been read (see RIOT) (*Redford v. Birley*, 1823, 1 St. Tri. N. S. 1071; *R. v. Fursey*, 1833, 3 St. Tri. N. S. 543). In *O'Kelly v. Harvey*, 1883, 15 Cox C. C. 576, the Irish Court of Appeal have held that if an assembly be not unlawful, yet if there is a danger of breach of the peace (*q.v.*) owing to a threatened attack upon it by another body, the magistrates, as peace officers, are justified in dispersing the assembly though not unlawful. The opposite seems to have been impliedly ruled by Lord Coleridge, L. C. J., and Field, J., in *McClenagan v. Waters*, a case referred to by Mr. Dicey, as reported in the *Times* of 18th July 1882.

[See 2 Stephen's Hist. Cr. L. 385; Wise on *Riots, etc.*; Dicey, *Law of the Constitution*, Note V., Questions connected with the right of public meeting.]

Assent.—See CONTRACT.

Assent (Royal).—The royal assent is necessary to legislation, and by 13 Car. II. stat. 1, c. 1, s. 3, anyone who affirms "that both Houses of Parliament or either House of Parliament have or hath a legislative power without the king," is subjected to the penalty of a *premunire* (*q.v.*). The term veto, which is generally applied to the power of invalidating what would otherwise have been valid, does not apply to the power of giving or withholding the royal assent. It was formerly doubted whether the giving of the royal assent to a single bill did not determine the session of Parliament, but the contrary has long been established. The royal assent may be signified by the sovereign in person in the House of Lords, or, as is now more usually done, by a royal commission under the great seal; this method dates from 33 Henry VIII., and its legality is declared by 33 Henry VIII. c. 21, the Act

for the Attainder of Queen Catherine Howard. In 1811, when Geo. III. had become insane and incapable of performing any official act, the Lord Chancellor nevertheless affixed the great seal to a commission for giving the royal assent to the Regency Bill, which thus became law. Money bills are carried up by the Speaker of the House of Commons, and are the first to obtain the royal assent, the form being, "*La reyne remercie ses bons sujets, accepte leur benevolence, et ainsi le veult.*" In the case of public bills, the form is "*La reyne le veult*;" for private bills, "*Soit fait comme il est desire*," or if the royal assent be withheld, "*La reyne s'avisera.*" For a petition demanding a right, whether public or private, the form is, "*Soit droit fait comme il est desire.*" A now disused form of giving the assent of the Lords and Commons to an act of grace and pardon, which originated with the Crown, is given in Erskine May. These old French forms are a survival from the fourteenth century, when all the proceedings in Parliament were in French. The royal assent has not been withheld since Queen Anne refused her assent to the bill for settling the Scotch Militia in 1707 (18 Lords J. 506), owing to the arrival of news after the bill had passed both Houses, that the Pretender had sailed for Scotland. The chief reason of this is that since the Revolution the Crown acts on the advice of Ministers who are not in a position to defy Parliament; they must, therefore, advise the Crown to give the royal assent, or to appeal to a new Parliament by a dissolution. The royal assent has been so long disused, that, as in so many other cases, a conventional rule or custom of the Constitution may be said to have grown up, regulating the *legal* right of the Crown to give or withhold its assent by providing that it should always be given.

[See Erskine May, *Parliamentary Practice*; Anson, *Law and Custom of the Constitution*, vol. i. p. 252; Hearn, *Government of England*, p. 60; Dicey, *Law of the Constitution*; Todd, *Parliamentary Government in England*.]

Assessment.—See POOR LAW (*Rating*); RATING.

Assessment Committee.—The assessment committee is a statutory committee appointed for the purpose of making out the valuation list, which is the basis of the poor-rate. The Union Assessment Acts, 1862 to 1880, 25 & 26 Vict. c. 103; 27 & 28 Vict. c. 39; 43 & 44 Vict. c. 7, apply generally throughout England and Wales, save in parishes where local Acts are in force. With regard to the metropolis, the Union Assessment Acts, 1862 and 1864, also apply; but many sections of those Acts are repealed by the Valuation (Metropolis) Act, 1869, 32 & 33 Vict. c. 67, so far as they relate to the "unions and parishes not in union, which are, for the time being, either wholly, or for the greater part in value thereof, respectively situate within the jurisdiction of the London County Council" (32 & 33 Vict. c. 67, s. 3). It is the duty of the board of guardians of every union, at their first meeting after the annual election of guardians, to appoint from among themselves any number not less than six, nor more than twelve, to be members of the assessment committee (25 & 26 Vict. c. 103, s. 2). Where the union has the same bounds as a municipal borough, the clerk to the guardians shall, if directed by the guardians, transmit the names of the persons appointed to the town council of the borough, who may appoint from among themselves additional members not exceeding the number appointed by the guardians (*ibid.* s. 3). If the guardians neglect or be prevented from making the appointment, the Local Government Board shall appoint some other

day on which the guardians shall make the appointment (*ibid.* s. 4; 34 & 35 Vict. c. 70, s. 2). If a member of the committee cease to be a guardian, or resign his seat on the committee, or die, or become incapable of acting, the board of guardians shall, with all convenient speed, appoint a guardian to supply the vacancy (25 & 26 Vict. c. 103, s. 5). Continuing members may act during any such vacancy (*ibid.* s. 6). The committee, whose authority extends over every parish comprised in the union (*ibid.* s. 7), must hold their first meeting at the board-room of the union, on a day fixed by the board of guardians (*ibid.* s. 8). The time and place of subsequent meetings are fixed by the committee (*ibid.*), and not by the guardians. Committees usually lay down rules for their guidance, but they have no power to bind their successors in regard thereto. The quorum of meetings is not less than three, and in any case not less than one-third of the whole number of the committee (*ibid.* s. 9). In case of equality of votes, the presiding chairman has a second, or casting, vote (*ibid.*). The committee shall employ the clerk or assistant-clerk of the guardians as their clerk, with such remuneration as the Local Government Board shall sanction (*ibid.* s. 10), such remuneration being paid by the guardians, and charged on the common fund (*ibid.* s. 38). It is the duty of the committee to cause a minute of their proceedings to be taken, and of the names of the members attending each meeting (*ibid.* s. 11). The minute-book, provided by the committee, shall be kept by the clerk, and every entry shall be signed by the presiding chairman present at the meeting at which the proceeding took place (*ibid.*). Such entries, so signed, shall be received as evidence in all Courts, without proof of such meeting having been duly convened or held, or of the persons attending such meeting having been or being members of the committee, or of the signatures of the members, all of which facts shall be presumed until the contrary is proved (*ibid.*). The committee, by their order, may, from time to time, require the overseers, assistant-overseers, constables, assessors, collectors, and any persons having the custody of any books of assessment, of any taxes or rates, parliamentary or parochial, or of the valuations of any parish, or having the collection or management of any such taxes or rates, to make returns in writing to the committee of all such particulars as they may direct in relation to such taxes, rates, or valuations, or any property included therein, so far as relates to the union for which they act (*ibid.* s. 13). A county rate for this purpose is a parochial rate (*R. v. Aylesbury Overseers*, 1846, 9 Q. B. 261); and the land tax is a parliamentary tax (*Manning v. Lunn*, 1845, 2 Car. & Kir. 13; *Christ's Hospital v. Harrild*, 1841, 2 M. & G. 707), but a sewers rate is not (*Palmer v. Earith*, 1845, 14 L. J. Ex. 256). The committee may require persons having the custody of the before-mentioned books to make and transmit to them copies of or extracts from them, or to permit such copies or extracts to be made by such persons as the committee may direct (25 & 26 Vict. c. 103, s. 13), and they may also require persons having the custody of any such books, or the collection or management of the taxes or rates before-mentioned, to attend before them and produce all parochial and public books of assessment, rates, rate-books, valuations, apportionments, tithes, and other maps, plans, surveys, and other public documents in their custody or power (25 & 26 Vict. c. 103, s. 13); penalty on refusal not exceeding £20 (*ibid.* s. 40). The committee may examine all persons who shall attend before them (*ibid.* s. 13), but not, it would appear, upon oath; penalty on refusal to give evidence, or for giving false evidence, not exceeding £20 (*ibid.* 40). It is the duty of the overseers to prepare the valuation lists. Section 14 of the Act of 1862 directs that

the overseers shall prepare the lists within three calendar months after the appointment of the committee, but this direction only applies to the first appointment of a committee under the Act, and not to a subsequent appointment (Circ. P. L. B., Mar. 1, 1864). A form of valuation list is contained in a schedule to the Act of 1862. A column in the form is headed "gross estimated rental," which is defined as "the rent at which the hereditament might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent charge, if any" (25 & 26 Vict. c. 103, s. 15). The valuation list for each parish, made and signed by the overseers, shall be deposited by the overseers in the place where rate-books are deposited or kept, and a copy shall be forthwith delivered to the board of guardians (*ibid.* s. 17). The overseers shall give public notice of the deposit on the Sunday next following the deposit, and all persons assessed or liable to be assessed to the relief of the poor of such parish shall have the like right of inspecting, and of demanding and taking copies of and extracts from such list, as in the case of a poor-rate allowed by the justices; as to which see 17 Geo. II. c. 2, ss. 1, 5; 6 & 7 Will. IV. c. 96, s. 5; 45 & 46 Vict. c. 20, s. 4. At the expiration of 14 days from the time of the notice given of the deposit, the overseers shall transmit the list to the committee, and any overseer or other ratepayer within the union shall have the right of inspecting and taking copies of and extracts from any of the lists so transmitted (25 & 26 Vict. c. 103, s. 17). Overseers of any parish in any union who shall have reason to think that their parish is aggrieved by the valuation list of any parish within such union, or any person who may feel himself aggrieved by any valuation list, on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from the list, may object by notice in writing to the committee, specifying the grounds, and in certain cases to the person whose hereditament is objected to, before the expiration of twenty-eight days after the notice of the deposit (*ibid.* s. 18). The committee shall hold such meetings as they think necessary for hearing objections, twenty-eight days' previous notice of which must be given (*ibid.* s. 19). The committee have no power to administer an oath, or to make an order as to costs. The objector may appear in person or by an agent (*R. v. St. Mary Abbots* [1891], 1 Q. B. 378). The committee may, whether any objection be or be not made to any valuation list, direct a further valuation and correct the valuation lists, and, when corrected, approve the same (25 & 26 Vict. c. 103, s. 20). A valuation list when altered must be re-deposited (*ibid.* s. 21; *R. v. Chorlton Union*, 1872, L. R. 8 Q. B. 5), so that persons interested may be informed of the alterations, and may make fresh objections, after which the list is to be approved. If, on appeal, a rate is amended, the committee must alter the valuation list accordingly (25 & 26 Vict. c. 103, s. 22). After approval of the list, the committee are required to give a fair copy, signed by three members, to the overseers, and retain the original (*ibid.* s. 23; 31 & 32 Vict. c. 122, s. 30). The valuation list in force in a parish (not subject to a local Act) at any time, is the approved valuation list subject to the alterations and additions made thereto by supplemental valuation lists (25 & 26 Vict. c. 103, s. 24). It is the duty of overseers to prepare supplemental valuation lists, in case of additions to, or alterations in, the rateable property of the parish (*ibid.* s. 25). New houses completely finished and ready for occupation, even though not occupied, must be inserted in the list (*R. v. Malden Overseers*, 1869, L. R. 4 Q. B. 326). The committee may, from time to time, direct a new or supplementary valuation list to be made by the overseers, or by a person appointed for the purpose, with the consent of the board of guardians

(25 & 26 Vict. c. 103, s. 26). The provisions as to deposit, objections, approval, etc., of a valuation list apply to a supplemental valuation list (*ibid.* s. 27). After a valuation list has been approved, no rate shall be allowed, unless made according to such list (*ibid.* s. 28). The expenses of overseers, subject to the consent of the vestry (*ibid.* s. 7), or parish council or parish meeting in rural parishes (56 & 57 Vict. c. 73, ss. 6, 19 (4); see also s. 33), or if no meeting be held, or no decision arrived at on the subject, then to the extent which the assessment committee shall allow, are charged upon the poor-rate (27 & 28 Vict. c. 39, s. 7). This consent need not be obtained before the expenses are incurred (*R. v. Chorlton-upon-Medlock*, 1875, 1 Q. B. D. 62). The expenses of the committee are paid by the guardians of the union, and charged upon the common fund (25 & 26 Vict. c. 103, s. 38), and the expenses of making a valuation and valuation list of a parish are charged upon the poor-rate of the parish, if the valuation made by direction of the committee exceed one-sixth the amount of the valuation delivered to them by the overseers (*ibid.* s. 39). In certain cases the committee may allow compensation for returns, etc. (*ibid.* s. 37). The committee shall cause a copy of the valuation list to be deposited in the board-room of the union, and it shall be open to the inspection, at reasonable times, of guardians and overseers without charge, and of any ratepayer within the union, on payment of one shilling (*ibid.* s. 31). The clerk of committee shall send annually, in the month of December, to the clerk of the peace, totals of valuation lists (27 & 28 Vict. c. 39, s. 9). Any railway, telegraph, canal, gas and water company, named in a list as occupier, and having no office or place of business in the parish, shall receive from the committee notice of the rateable value entered within fourteen days after the transmission to the committee of any valuation or supplemental valuation list (*ibid.* s. 5). In certain cases a loan may be obtained for valuation purposes (*ibid.* s. 8), as also a map or plan (*ibid.* s. 10). It is the duty of the board of guardians, in the month of April in every year, to report the proceedings of their assessment committee to the Local Government Board (25 & 26 Vict. c. 103, s. 12).

As to appeals against the valuation list, see POOR LAW (*Rating*).

Assessors.—*House of Lords.*—The House may, in appeals (*q.v.*) in Admiralty actions, call in the aid of one or more assessors, and hear such appeals wholly or partially, with the assistance of such assessors (54 & 55 Vict. c. 53, s. 3).

Privy Council.—The Queen in Council may make rules for the attendance on the hearing of ecclesiastical cases by the Judicial Committee of archbishops and bishops as assessors (39 & 40 Vict. c. 59, s. 14, and *Rules made by Order in Council*, 15th November 1876, 2 P. D. 384; and see *Read v. Bishop of Lincoln* [1892], App. Cas. 644). Assessors may also be called in aid in patent cases (46 & 47 Vict. c. 57, s. 28).

The Court of Appeal and High Court may in any cause or matter call in the aid of one or more assessors (36 & 37 Vict. c. 66, s. 56; R. S. C. Order 36, rr. 7 and 43; Order 68, r. 1). Special provision is made for assessors in patent cases by the Patents Act, 1883, 46 & 47 Vict. c. 57, s. 28.

In the Admiralty Division, the Elder Brethren of Trinity House are commonly employed as nautical assessors (see Williams and Bruce, *Admiralty Practice*, 2nd ed., p. 441). (See TRINITY HOUSE.) Their duty is to aid the judge by answering any questions he may put as to

nautical skill and experience. They take no part in the judgment, for which the judge alone is responsible (*The Beryl*, 1884, 9 P. D. 137; 53 L. J. P. 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. 321).

The Elder Brethren may also be employed as assessors on appeals in the High Court from the County Court in cases heard in the County Courts by a judge and nautical assessors (51 & 52 Vict. c. 43, s. 125).

County Courts.—The judge, on the application of either party, may in any case summon to his assistance one or more assessors (51 & 52 Vict. c. 43, s. 103, and Order 21 of the County Court Rules, 1889).

In employers' liability cases the assessors have only to ascertain the amount of compensation (43 & 44 Vict. c. 42, s. 86; County Court Rules, 1889, Order 44).

In Admiralty cases in the County Courts, the judge may be assisted by two nautical assessors or by two mercantile assessors (31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51, s. 5).

If one party asks for a jury and the other party for assessors, the trial must be by judge and assessors (*The Tynwald* [1895], Prob. 142; 64 L. J. p. 1; 43 W. R. 509; 71 L. T. 713).

Courts of Survey consist of a judge sitting with two surveyors as assessors (57 & 58 Vict. c. 60, ss. 487, 488. See ss. 459, 466, 467, and Shipping Casualties Rules, 1895, as to appointment and duties of assessors for the Court of Survey; s. 490 as to scientific referees; s. 548 as to assessors on summary determination of disputes as to salvage; and s. 610 as to assessors on appeals by pilots from suspension or dismissal).

In the *Ecclesiastical Courts*, assessors sit with the Bishop in proceedings under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86, s. 1), and with the Chancellor to determine questions of fact in proceedings under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32, ss. 2 and 3, and *Statutory Rules and Orders*, 1892, p. 258). As to the jurisdiction of the Archbishop sitting with assessors, see *Read v. Bishop of Lincoln*, 1889, 14 P. D. 88; 61 L. T. 402; Phillimore's *Ecclesiastical Law*, 2nd ed., p. 73.

Assets.—The word "assets" is a form of the French word "*assez*," enough, and is usually employed to signify the estate of a deceased person, *sufficient* to satisfy his debts, though sometimes applied more generally to express any distributive estate, whether the owner is deceased or not. But all property in the hands of an executor is not necessarily assets. Thus, while an advowson is assets, the right of presentation to a living vacant at the death of the testator, by reason of its not being vendible, is not assets. See ADVOWSON.

Assets, in the ordinary sense, are divisible into two classes—legal and equitable. Legal assets are those which creditors could make available for the payment of debts in a Court of law; equitable assets are those which could be made available for that purpose only through a Court of equity. Legal assets comprise everything that comes to an executor or administrator *virtute officii*, or, in other words, such property as would have come to the executor, as such, if the testator had by his will merely appointed him executor and said nothing further about the disposition of his property, or to the administrator on an intestacy (*Cook v. Gregson*, 1856, 3 Drew. 547; *Bain v. Sadler*, 1871, L. R. 12 Eq. 570). The remedy of the creditor, whether legal or equitable, determines whether the assets are legal or equitable, and not the remedy of the executor, or the legal or equitable nature of the property. Thus the portions of

younger children charged on the family estate are generally only recoverable in equity, but they are legal and not equitable assets (*A.-G. v. Brunning*, 1860, 8 H. L. 242).

Down to a comparatively recent date, although freeholds which had descended to the heir, or had been devised without provision for payment of debts, were liable to the specialty debts of the deceased, simple contract creditors had no remedy against them, and copyholds were not liable to either class of creditors. But by Lord Romilly's Act, 3 & 4 Will. IV. c. 104, all estates and interests in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or copyhold, which any person dies seized of or entitled to, and which he has not by his will charged with or devised subject to the payment of his debts, are made assets to be administered in Courts of equity for payment of both specialty and simple contract debts (see *In re Illidge, Davidson v. Illidge*, 1884, 27 Ch. D. 478). The Act gave, however, a priority to specialty creditors, which was abolished by 32 & 33 Vict. c. 46, whereby all the creditors of a deceased person, as well specialty as simple contract, were put on an equal footing as to payment out of the assets, whether legal or equitable, but without prejudice to any lien, charge, or other security. A specialty debt, however, due to the Crown is still entitled to priority in the case of legal assets; and a surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of the principal's estate (see *In re Lord Churchill, Manisty v. Churchill*, 1888, 39 Ch. D. 174).

Interests in lands devised for, or charged with, payment of the testators' debts, though the devisees or persons to sell are executors, are equitable assets (*Silk v. Prime*, Dick, 384). A general direction in a will for payment of the testator's debts creates a charge on real estate (see Jarman, *Wills*, 5th ed., vol. ii. pp. 1393-7; *Corser v. Cartwright*, 1875, L. R. 7 H. L. 731); but a direction that the executors shall pay the debts will not, in the absence of special words, create a charge, except as to realty devised to them as joint-tenants, whether in trust or for their own benefit, and whether equal beneficial interests are intended to be given to them or not (*In re Tanqueray-Willauve and Landau*, 1882, 20 Ch. D. 465; and see, as to an appointment by a married woman, *In re De Burgh Lawson*, 1889, 41 Ch. D. 568), unless a contrary intention appears upon the whole will (*In re Bailey*, 1879, 12 Ch. D. 268).

The separate estate of a married woman was distributable as equitable assets, and the Married Women's Property Act, 1870, 33 & 34 Vict. c. 93, did not alter the rule (*In re Poole, Thompson v. Bennett*, 1877, 6 Ch. D. 739). See HUSBAND AND WIFE.

An equity of redemption in freeholds, copyholds, or leaseholds, is legal and not equitable assets.

After payment of the funeral expenses and testamentary expenses, including the costs of an administration action (see *Penny v. Penny*, 1879, 11 Ch. D. 440), which are entitled to priority out of both legal and equitable assets, legal assets are applicable in the following order:—(1) Debts due to the Crown by record or specialty; (2) debts to which priority is given by particular statutes; (3) judgments in Courts of record against the deceased in his lifetime, rateably, but they must have been registered under 23 & 24 Vict. c. 38, s. 3 (as to what are judgments, see Seton, 5th ed., pp. 427, 434, 1201); (4) judgments against the executor or administrator, whether registered or not, according to priority of date; (5) recognisances and statutes (see Williams, *Executors*, 8th ed., p. 1010); (6) specialty and simple contract

debts, and unregistered judgments against the deceased; (7) voluntary covenants and bonds.

Equitable assets are distributable *pari passu* among all creditors, since "equality is equity." An executor or administrator has no right of retainer out of equitable assets; and a trustee of an estate devised to him for the purpose of paying debts has no right of retainer thereout, whether he is executor or not (*Bain v. Sadler*, 1871, L. R. 12 Eq. 570).

Before judgment for administration has been made, an executor or administrator has the right, out of legal assets, to prefer one creditor to another, though of equal degree. An order for an account, under R. S. C., Order 15, but not directing application of the assets in a due course of administration, does not affect this right (*In re Barrett, Whitaker v. Barrett*, 1890, 43 Ch. D. 70). An executor or administrator has the right to retain his own debt out of legal assets in priority to all other creditors of equal degree, and this right is not affected by judgment for administration, but cannot be exercised after the appointment of a receiver out of assets got in by him (*In re Jones, Carver v. Laxton*, 1885, 31 Ch. D. 440; and see *In re Wells, Molony v. Brooke*, 1890, 45 Ch. D. 569). Administration will not now be granted to a creditor except upon his entering into a bond to pay all debts, his own included, *pro rata* (*In the goods of Bruckenburg*, 1877, 2 P. D. 272).

The assets are liable for payment of debts in the following order, subject to any special directions in the will:—

1. The general personal estate not specifically bequeathed or exonerated (legal assets);
2. Real estate devised in trust for payment of debts (equitable assets);
3. Real estate descended (legal assets);
4. Real estate devised, charged with the payment of debts (equitable assets);
5. General pecuniary legacies;
6. Specific and residuary devises and specific bequests, *pro rata* (legal assets; and see *Lancefield v. Iggulden*, 1874, L. R. 10 Ch. 130);
7. Real and personal estate appointed under a general power. See POWERS.

Where the assets are in the first instance not applied in the order above given, the estate remaining after payment of creditors will be marshalled so as to adjust the rights *inter se* of the persons beneficially interested. A pecuniary legatee is entitled to stand in the place of a creditor against real estate charged with debts (*Re Salt, Brothwood v. Keeling* [1895], 2 Ch. 203). Marshalling between legal and equitable assets may also be required, so that creditors who have been partly paid out of legal assets may bring the amount into hotchpot as a condition to receiving further payment out of equitable assets. The Court will also marshal as between legatees, when some of the legacies are charged on the real estate and some not. Under the former law relating to Mortmain (*q.v.*), the Court would not (unless the testator so directed) marshal in favour of charitable legacies, so as to reserve the pure personal estate for their payment, but the recent Act (54 & 55 Vict. c. 73) has rendered this doctrine unimportant (and see *In re Hume, Forbes v. Hume* [1895], 1 Ch. 422, 425 *et seq.*). [As to MARSHALLING generally, see that heading.]

If an executor or administrator admits assets for the payment of debts or legacies, he becomes personally liable to the creditor or legatee (see 2 Seton, 5th ed., pp. 1253–1255).

As to refunding assets in favour of creditors, or legatees and next-of-

kin, see 2 Seton, 5th ed., pp. 1395–1398; and as to foreign assets and the jurisdiction relating thereto, see *ib.*, pp. 1337–1339.

The administration by the Court of the assets of a debtor who has died insolvent, is now regulated by the bankruptcy law (see Judicature Act, 1875, s. 10; Bankruptcy Act, 1883, ss. 9 (2), 37, 168; Sched. 2, rr. 9–17).

In the administration of the English assets of a person domiciled abroad, no priority is given to English over foreign creditors (see *In re Kloebe, Kannreuther v. Geiselbrecht*, 1884, 28 Ch. D. 175).

[*Authorities.*—Story's *Equity Jurisprudence*; Williams on *Executors*; Jarman on *Wills*, 5th ed.]

Assignment.—For the various forms of assignment, *e.g.* of Copy-right Designs, etc., see these and similar headings.

Assignment (Fraudulent).—See BANKRUPTCY; FRAUDULENT CONVEYANCES.

Assignment of Dower.—See DOWER.

Assignment of Errors.—See ERROR.

Assignment (of Property).—See BANKRUPTCY; BILLS OF SALE.

Assignments of Choses in Action.

I. AT COMMON LAW.

At common law “a chose in action cannot be assigned or granted over to another” (*Master v. Miller*, 1791, 4 T. R. 340; 2 R. R. 399; 1 Sm. L. Cas., 10th ed., 747). And the phrase “chose in action” includes not only debts, but stock in the funds, shares in a company—in short, “all personal chattels which are not in possession” (*per* Lord Blackburn in *Colonial Bank v. Whinney*, 1886, 11 App. Cas. 440). Any attempt to assign such a chose in action was invalid; the assignee could not sue on the assignment in his own name; the action could only be brought in the name of the assignor. There were only two exceptions to the rule—(1) The Crown could assign its choses in action (4 T. R. 340). (2) There could be a valid assignment by operation of law, *e.g.* on marriage, death, or bankruptcy.

The law merchant, however, disregarded the rules of the common law, and permitted negotiable instruments to be freely assigned; the acceptor or indorser of a bill of exchange was always liable to be sued by a stranger with whom he had never contracted. And scrip issued in this country by the agent of a foreign government, entitling the holder, on payment of the instalments, to receive from that agent definitive bonds of the foreign government, has been held to be negotiable by international custom, and to pass by delivery to a *bonâ fide* holder for value (*Goodwin v. Roberts*, 1876, 1 App. Cas. 476; *Rumball v. Metropolitan Bank*, 1877, 2 Q. B. D. 194; but see *Fine Art Society v. Union Bank*, 1886, 17 Q. B. D. 705). So, too, Parlia-

ment has from time to time rendered certain choses in action assignable. Promissory notes, if not freely negotiable before, were rendered so by the Statutes 3 & 4 Anne, c. 9, and 7 Anne c. 25. The Sheriff was allowed to assign a bail-bond to a purchaser, who could then sue both the principal and the bail thereunder in his own name (4 & 5 Anne, c. 16, s. 20). Replevin bonds (11 Geo. II. c. 19); mortgage bonds of a company (8 & 9 Vict. c. 17, s. 45); bills of lading, if endorsed (18 & 19 Vict. c. 111); East India Bonds (51 Geo. III. c. 64, s. 4); mortgage debentures issued by land companies under the Mortgage Debenture Act, 1865, 28 & 29 Vict. c. 78; debts and things in action of companies (Companies Act, 1862, 25 & 26 Vict. c. 89); choses in action of bankrupts (32 & 33 Vict. c. 71, s. 22); and transferable debentures under the County Debenture Act, 1873, 36 & 37 Vict. c. 35, were subsequently made assignable. By 30 & 31 Vict. c. 144, policies of life assurance may be legally assigned, either by endorsement of the policy, or by a separate instrument in the form provided by the Act. And by 31 & 32 Vict. c. 86, policies of marine insurance may similarly be assigned by endorsement in statutory form. In all these cases the assignee could sue at law in his own name.

But in all other cases the common law remained unaltered till 1875. Thus an ordinary simple contract debt could not, before the Judicature Act, be legally assigned, nor could the benefit or burden of a covenant in a deed, apart from an interest in realty. And, what is more, the original parties to the contract could not make it assignable, if it was not assignable by the law merchant or under some statute; they could not of their own motion create a new class of negotiable instruments, or add to their obligation a quality which was not inherent in it by law (*Couch v. Credit Foncier of England*, 1873, L. R. 8 Q. B. 374; *Picker v. London and County Bank*, 1887, 18 Q. B. D. 515; *London and County Bank v. River Plate Bank*, 1887, 20 Q. B. D. 232). The only way in which a debt could be transferred at common law was by a new contract, in which all three parties—assignor, assignee, and debtor—took part. And this new contract required consideration to support it; the debtor had to be released by the assignor, and to consent expressly in consideration of such release to become liable to the assignee (*Tatlock v. Harris*, 1789, 3 T. R. 174, 180; *Fairlie v. Denton*, 1828, 8 Barn. & Cress. 395; *Kemp v. Watt*, 1846, 15 Mee. & W. 672). This was in fact a *novation*, not an assignment.

The reasons given for this state of the law were that the Courts ought not to relax the rules relating to privity of contract; that to do so would lead to oppression and multiplicity of suits (see *Lampet's case*, 1613, 10 Rep. 48, c); that it was the duty of a debtor to seek out his creditor and find him, if he were anywhere within the narrow seas; and that it would be difficult for him to do this, if the debt might without his consent be assigned to a stranger (6 C. B. 290, n).

II. IN EQUITY.

No regard was ever paid to these considerations in equity. The Court of Chancery from a very early period recognised as valid, and carried into effect, assignments of a chose in action, and even of a mere naked possibility, provided they were made for valuable consideration (*Anon.*, 1673, Free. Chy. 145; *Squib v. Wyn*, 1717, 1 P. Wms. 378). Thus a mere expectancy, such as that of an heir-at-law to the estate of an ancestor (*Hobson v. Trevor*, 1723, 2 P. Wms. 191), or the interest which a person may take under the will of another then living (*Warmstrey v. Lady Tanfield*, 1629, 1 Ch. R. 29; 2 W. & T. L. Cas., 6th ed., 794; *Musprat v. Gordon*, 1792, 1 Anst. 34; 3 R. R. 541;

Bennett v. Cooper, 1846, 9 Beav. 252), was always assignable in equity for valuable consideration, and when the expectancy fell into possession the assignment would be enforced, unless public policy or some other rule of equity forbade. The same rule prevailed, and still prevails, in equity in the case of non-existing property to be hereafter acquired, such as freight not yet earned (*Lindsay v. Gibbs*, 1856, 22 Beav. 522), future patent rights (*Printing, etc., Co. v. Sampson*, 1875, L. R. 19 Eq. 462), or machinery yet to be erected (*Holroyd v. Marshall*, 1862, 10 H. L. 191; 33 L. J. Ch. 193). But the claim of such an assignee will always be postponed to the right of a *bond fide* purchaser, who secures the legal title (*Joseph v. Lyons*, 1884, 15 Q. B. D. 280; *Hallas v. Robinson*, 1885, 15 Q. B. D. 288); and is subject also to the title of the assignor's trustee in bankruptcy, in case the bankruptcy occurs before the expectancy falls into possession (*Ex parte Hall*, 1879, 10 Ch. D. 615; *Collyer v. Isaacs*, 1881, 19 Ch. D. 342; *Ex parte Nichols*, 1883, 22 Ch. D. 782; *Wilmot v. Alton* [1896], 2 Q. B. 254; but see *Ex parte Rawlings*, 1888, 22 Q. B. D. 193). No man can make a valid assignment of money which never accrues due to him, but only to his trustee in bankruptcy. On the other hand, "a garnishee order binds only so much of the debt owing to the debtor from a third party, as the debtor can honestly deal with at the time the garnishee order was obtained" (*Davis v. Freethy*, 1890, 24 Q. B. D. 522). Hence the judgment creditor of an assignor, who has obtained a garnishee order without any notice of the assignment, can only attach such property of his debtor as the debtor could himself deal with properly, and without violation of the rights of the assignee (*Ex parte Whitehouse*, 1886, 32 Ch. D. 512; *Badeley v. Consolidated Bank*, 1888, 38 Ch. D. 238).

But equity could not wholly disregard the law in this matter. If the assignee were allowed to sue in equity and recover the debt behind the back of the assignor, the unfortunate debtor might be subjected to a second action at common law, and be compelled to pay the debt over again. If the assignor had given a power of attorney authorising the assignee to sue for the debt in the name of the assignor, and that course was adopted, the judgment would bind the assignor (as it would stand in his name), and be a good discharge to the debtor at law as well as in equity. But if the assignee sued in his own name in equity, the decree in his favour would be no bar to an action by the assignor at common law. If the chose in action was of a purely equitable nature, this would not matter; as the assignor could never sue for it at law. But in all other cases the equity judges very properly required the assignee to bring the assignor before the Court, so that he should be bound by their decree. If he would not consent to join as a co-plaintiff with the assignee, he was made a defendant; but he had to be a party to the proceedings on one side or other of the record.

III. UNDER THE JUDICATURE ACT.

There being this conflict between law and equity, a provision, curiously limited, was inserted in the Judicature Act of 1873, which did not wholly supersede the common law, nor establish the equitable procedure, but which created a *tertium quid*:

Sec. 25, subs. 6.—"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of

the assignee, if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor; provided always, that if the debtor, trustee, or other person liable in respect of such debt, or chose in action, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the Acts for the relief of trustees."

This section, it will be observed, affects procedure rather than the substantive law; "it does not give new rights, but only affords a new mode of enforcing old rights" (*Walker v. Bradford Old Bank*, 1884, 12 Q. B. D. 515; *Read v. Brown*, 1888, 22 Q. B. D. 128). It makes nothing an assignment which was not an assignment before (*Schroeder v. The Central Bank*, 1876, 24 W. R. 710; 34 L. T. 735). On the other hand, many an assignment which was valid in equity before the Judicature Act is not within the scope of this section, and is therefore still invalid in law, and can only be enforced in the manner usual in Courts of equity before the Act, i.e., the assignor must still be joined, either as a plaintiff or a defendant (see *Turquand v. Fearon*, 1879, 4 Q. B. D. 280). And in cases which do fall within the section, all former equities remain unaffected; the assignee has the benefit of a new procedure at law; but none of the rights of the debtor or of the assignor are restricted or destroyed (*Hudson v. Fernyhough*, 1889, 61 L. T. 722; and see the judgment of A. L. Smith, J., in *Walker v. Bradford Old Bank*, 1884, 12 Q. B. D. 517).

The distinctions between assignments within the section and those outside it should be carefully noted, so that the plaintiff may know which procedure to adopt.

(1) The section applies only to assignments of "legal choses in action." The word "legal" was probably inserted, because equitable choses in action were already assignable; but it would have been better omitted; as now since the fusion of law and equity it is somewhat difficult to define "a legal chose in action." The phrase clearly is not restricted to those choses in action which could be assigned at law before the Act was passed. It must surely include all choses in action which the assignor, in the absence of any assignment, could now recover by an action in the Queen's Bench Division. A debt not yet due is a legal chose in action (*Brice v. Bannister*, 1878, 3 Q. B. D. 569). But legacies, trust-funds, and claims against the estate of a deceased person which is being administered in the Chancery Division, remain apparently equitable choses in action; and if so, are not within the section. In *Cronk v. M'Manus*, 1892, 8 T. L. R. 449, Denman, J., held that "a mere equity of redemption" was not "a legal chose in action." A promise by a lender to make further advances to the borrower is not a legal chose in action (*Western Wagon Company v. West* [1892], 1 Ch. 271; *May & another v. Lane*, 1894, 64 L. J. Q. B. 237). The Court of Appeal in the latter case expressed the opinion (*obiter*) that the right to bring an action for unliquidated damages, whether in tort or contract, was not "a legal chose in action" within this section, and therefore not assignable, *sed quere*. In *King v. Victoria Insurance Company, Ltd.* [1896], App. Cas. 250, the Supreme Court of Queensland held that identical words in their Colonial Act included "all rights, the assignment of which a Court of law or equity would before the Act have considered lawful" (p. 254), and the Judicial Committee of the Privy Council did "not express any dissent" from this view (p. 256).

(2) The section deals only with absolute assignments "not purporting to be by way of charge only." A deed by which debts are assigned to the plaintiff upon trust that he should receive them, and out of them pay himself a sum due to him from the assignor, and then pay the surplus to the assignor, is an absolute assignment within the section (*Burlinson v. Hall*, 1884, 12 Q. B. D. 347; *Ibberson v. Neck*, 1886, 2 T. L. R. 427). So is a mortgage of debts due to the mortgagor, made in the ordinary form with a proviso for redemption and reconveyance upon repayment, provided it transfers the property to the mortgagee subject to that proviso (*Tancred v. Delagoa Bay Ry. Co.*, 1889, 23 Q. B. D. 239). An assignment of a debt or legal chose in action may be absolute within the Judicature Act, 1873, s. 25, subs. 6, although a trust is thereby created in respect of the proceeds of such debt or chose in action in favour of the assignor (*Comfort v. Betts* [1891], 1 Q. B. 737; *In re Bell* [1896], 1 Ch. 1). The decision in *National Provincial Bank of England v. Harle*, 1881, 6 Q. B. D. 626, is no longer law.

(3) It was essential to the validity of an equitable assignment before the Act (and it still remains essential in all cases not within this section), that the assignment should be for valuable consideration; without such consideration there was no ground for the interference of a Court of equity. But in the case of an assignment, otherwise valid under this section, there is no necessity for the assignee to prove that there was any consideration for the assignment (*Lee v. Magrath*, 1882, 10 L. R. Ir. 45; *Walker v. Bradford Old Bank*, 1884, 12 Q. B. D. 511; *Harding v. Harding*, 1886, 17 Q. B. D. 442).

(4) The assignment must be in writing, and express notice thereof must be given in writing. The assignee must prove both, or he will establish no cause of action (*Read v. Brown*, 1888, 22 Q. B. D. 128). In equity, a verbal assignment, and verbal notice, if clearly proved, was formerly, and still is, sufficient (*post*), provided the assignor be made a party to the action, and the assignment be for valuable consideration. If there be no consideration, as in the case of a voluntary gift, then the assignee must show an assignment in writing, or no interest will pass (*In re Richardson*, 1885, 30 Ch. D. 396-7). The section does not state by whom the notice is to be given, or fix any limit of time within which it must be given. Hence a notice in writing, given by the assignee after the death of the assignor, will be sufficient (*Walker v. Bradford Old Bank*, 1884, 12 Q. B. D. 511, 517).

(5) But an assignment under the Judicature Act resembles an equitable assignment (*q.v.*), and differs from the transfer of a negotiable instrument under the law merchant in this, that the assignee takes subject to all sets-off and equities which would avail against the assignor, not merely at the date of the assignment, but until notice is given (*Walker v. Bradford Old Bank*, *supra*).

As to the procedure under the concluding proviso of the section, which extends the power to interplead, see *In re New Hamburg Ry. Co.*, 1875, W. N. p. 239; *In re Sutton's Trusts*, 1879, 12 Ch. D. 175; and *Reading v. School Board for London*, 1886, 16 Q. B. D. 686.

IV. WHAT IS A VALID ASSIGNMENT?

An order given by A. to B., directed to a third person who owes A. money; or who has or will shortly have in his hands money belonging to A., directing him to pay B. so much money out of that specific debt or fund, is a valid assignment of so much of that debt or fund. If the order be given under seal or for valuable consideration, it is binding at once on A., and cannot be revoked by him (*Fortescue v. Barnett*, 1834, 3 Myl. & K. 36);

it binds also A.'s trustee in bankruptcy and any execution creditor of his (*Gorringe v. Irwell*, 1886, 34 Ch. D. 128). Then, as soon as B. gives notice of the assignment to the debtor or the holder of the fund, it binds him too; it "fixes the money in his hand"; he can no longer pay the debt to A., or hand over the fund to him, without first satisfying B. If there was no consideration for the assignment, and it was not under seal, it can still be revoked; but, till it is revoked, it is valid and binding on the debtor or holder of the fund; any payment made by him in compliance with A.'s order is a good payment as against A.; and the receipt of the assignee is a discharge for the full amount assigned. And it will be idle for A. subsequently to repudiate the assignment, or to attempt after payment to countermand his order. There is no need of any express acceptance of the order by the holder of the fund; he need not attorn to the assignee or enter into any contract to hold the fund for him (*Yeates v. Groves*, 1791, 1 Ves. Jun. 281; *Burn v. Carvalho*, 1839, 4 Myl. & Cr. 703; *Bell v. L. & N. W. Railway Co.*, 1852, 15 Beav. 548). For it is unnecessary for a man to promise expressly to do what he is bound to do; and the holder must pay the money over to the assignee, even though the assignee refuses to indemnify him. If he pays the assignor, he can be compelled to pay the assignee over again (*Jones v. Farrell*, 1857, 1 De G. & J. 208).

The usual course is for the assignment to be addressed by the assignor to the assignee, and to be retained by the assignee, who addresses a separate document to the holder of the fund, giving him notice of the assignment. But this is not necessary. If the assignor thinks fit to part with the document constituting his title, and to forward it to the debtor, so as to make the one document both assignment and notice of assignment, this will be equally efficacious. Or, again, the assignor may address the document which constitutes the assignment to the holder of the fund and forward it direct to him; and this will be sufficient, both in equity and under s. 25 of the Judicature Act, 1873, subs. (6), if the document be shown or known to the assignee (*per* Lord Eldon, in *Ex parte South*, 1818, 3 Swans. 392; 19 R. R. 227; *Lett v. Morris*, 1831, 4 Sim. 607; *Brice v. Bannister*, 1878, 3 Q. B. D. 569; *Buck v. Robson*, 1878, 3 Q. B. D. 686; *Harding v. Harding and another*, 1886, 17 Q. B. D. 442). But in such a case care must be taken not to word the document so as to make it an informal bill of exchange, which, if not properly stamped, would be wholly inadmissible in evidence (*Diplock v. Hammond*, 1854, 2 Sm. & G. 141; 5 De G., M. & G. 320; 23 L. J. Ch. 550; *Ex parte Shellard*, 1873, L. R. 17 Eq. 109). But if the document relied on as an assignment be addressed by the assignor neither to his creditor nor to his debtor or the holder of the fund, but only to some agent of his own, such as his solicitor, rent-collector, bailiff, or steward, then this is not an assignment, so long, at all events, as it remains unknown to the assignee. Till then, it is like a power of attorney, or the appointment of a receiver (*Rodick v. Gandell*, 1851, 1 De G., M. & G. 763; *Bell v. L. & N. W. Railway Co.*, 1852, 15 Beav. 548). It is a mere mandate from a principal to his own agent, bidding him pay a debt out of a certain fund; and this gives the creditor no specific charge on that fund (*Morell v. Wooten*, 1852, 16 Beav. 197). Until it is communicated to the creditor, and assented to by him, it may be revoked (*Scott v. Porcher*, 1817, 3 Mer. 652; 17 R. R. 161), but not afterwards (*Greenway v. Atkinson*, 1881, 29 W. R. 560). And the bankruptcy or death of the principal operates as such a revocation (*Ex parte Hall*, 1879, 10 Ch. D. 615; *In re Russell*, 1893, 37 Sol. J. 212). But, after such communication, the

money is "fixed" in the agent's hands, and the order cannot be countermanded (*Fitzgerald v. Stewart*, 1831, 2 Russ. & M. 457).

Apart from the Statute of Frauds (as to which see *Ex parte Hall*, 1879, 10 Ch. D. 615), a verbal assignment, if it can be clearly proved, is perfectly valid in equity (*Field v. Megaw*, 1869, L. R. 4 C. P. 660); though it is not sufficient, as we have seen, under the Judicature Act. So also a verbal notice to the debtor is quite sufficient to make the assignment good in equity (*Ex parte Agra Bank*, 1868, L. R. 3 Ch. 555). And for either purpose, no special form of words is necessary. Any words will suffice, which show a clear intention to transfer a chose in action, or which distinctly appropriate a specific portion of a specified fund, to or to the use of the assignee (*Rodick v. Gandell*, 1852, 1 De G., M. & G. 763, 776); *Percival v. Dunn*, 1885, 29 Ch. D. 128; *Gorringe v. Irwell Co.*, 1886, 34 Ch. D. 128). The language must be sufficiently imperative to make it the duty of the debtor or holder to pay the money, when the time for payment arrives, to the assignee and not to the assignor. Documents commencing, "I hereby authorise you to pay," etc., were held sufficient in *Lett v. Morris*, 1831, 4 Sim. 607; *Diplock v. Hammond*, 1854, 2 Sm. & G., 141; 5 De G., M. & G. 320; and *M'Gowan v. Smith*, 1856, 26 L. J. Ch. 8. But a mere suggestion to the debtor or holder, leaving him free to exercise his discretion in whatever way he thinks best, will not be sufficient (*Watson v. Duke of Wellington*, 1830, 1 Russ. & M. 602).

It is not enough to mention the existence of a particular fund; there must be a clear intention to deal with it so as to benefit the assignee. Thus, merely informing a creditor that he will be paid as soon as a certain fund comes to hand, is no assignment of that fund (*Malcolm v. Scott*, 1843, 3 Hare, 39; *Jones v. Starkey*, 1852, 16 Jur. 510). A promise to pay money when the person promising shall be paid a debt due to him from a third person, is no assignment of that debt (*Field v. Megaw*, 1869, L. R. 4 C. P. 660). Drawing a bill of exchange on a merchant, or a cheque payable at a particular bank, is no assignment of any portion of the drawer's balance in the hands of that merchant or at that bank (*Shand v. Du Buisson*, 1874, L. R. 18 Eq. 283; *Hopkinson v. Forster*, 1874, L. R. 19 Eq. 74; *Schroeder v. The Central Bank*, 1876, 24 W. R. 710; 34 L. T. 735; *Brown, Shipley, & Co. v. Kough*, 1885, 29 Ch. D. 848).

Again, the debt or fund assigned must be clearly indicated; so that there will be no difficulty hereafter in identifying the property, an interest in which is transferred (*Percival v. Dunn*, 1885, 29 Ch. D. 128). Especial care is necessary in the case of choses in action, which are not yet vested in the assignor. These must be assigned as completely as any other debt; the document must purport by its own force to convey an interest in them to the assignee, leaving nothing to be done by either assignor or assignee to complete the title of the latter when they come into existence (*Reeve v. Whitmore*, 1864, 4 De G., J. & S.; 33 L. J. Ch. 63). If that be done, then very general words will suffice. Thus: "I hereby undertake that I will, when and as received, pay over to you all dividends coming to me in respect of my proof for £800 upon the estate of A." is a good assignment of all dividends subsequently declared (*In re Irving*, 1877, 7 Ch. D. 419). So, too, an assignment of "all the book-debts due and owing, or which may, during the continuance of this security, become due and owing to the mortgagor," is perfectly valid and sufficiently specific, though not limited to the book-debts of any particular business, and will entitle the assignee to recover all book-debts incurred after the assignment, whether in the business carried on by the mortgagor at the date of the assignment, or in any

other business (*Tailby v. Official Receiver*, 1888, 13 App. Cas. 523, overruling *Belding v. Read*, 1865, 3 H. & C. 955; and *In re D'Epineuil*, 1882, 20 Ch. D. 758). Future debts are clearly assignable, if apt words be used, not merely in equity, but also at law under the Judicature Act, e.g., rent not yet due (*Southwell v. Scotter*, 1880, 49 L. J. Q. B. 356; *Knill v. Prowse*, 1884, 33 W. R. 163), or retention-money not yet payable under a building contract (*Brice v. Bannister*, 1878, 3 Q. B. D. 569; *Buck v. Robson*, 1878, 3 Q. B. D. 686; *Ex parte Moss*, 1884, 14 Q. B. D. 310; *Drew & Co. v. Josolyne*, 1887, 18 Q. B. D. 590). So, too, an assignment of "all moneys of or to which he now is, or may during this security become, entitled under any settlement, will, or other document, either in his own right or as next of kin of his father, or any other person or persons," is not too vague, and will operate to pass to the assignee a share in residuary personalty, to which the assignor subsequently became entitled under the will of a testator, not his father (*In re Clarke*, 1887, 36 Ch. D. 348). "Vagueness comes to nothing if the property is definite at the time when the Court is asked to enforce the contract" (*per* Cotton, L. J., *ibid.*, p. 353). On the other hand, if the words be precise, but there is clear and satisfactory evidence that neither party intended the document to be an assignment, the Court will go behind the literal meaning of the words, and construe them according to the true intention of the parties (*In re Sheward* [1893], 3 Ch. 502).

Invalid Assignments.—An assignment of all a man's property, present and future, may be invalidated as an act of bankruptcy. But an assignment which affects one species of property only is valid (13 App. Cas. 535). Again, public policy forbids that effect should be given to assignments of pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to assure a due discharge of their official duties. Thus the pay of an officer in the army (*Stone v. Lidderdale*, 1795, 2 Anst. 533; 3 R. R. 622), and the salary of a judge, given to him to support the dignity of his office, have been held not assignable; but, *semble*, such assignments are valid when the office is a sinecure or the duties have ceased (*Arbuthnot v. Norton*, 1846, 5 Moo. P. C. 219; *Grenfell v. The Dean and Canons of Windsor*, 1840, 2 Beav. 544, 550).

On similar principles of public policy, the Court will not give effect to assignments which partake of the nature of champerty, or maintenance, or buying of pretended titles (*Stevens v. Bagwell*, 1808, 15 Ves. 139; 10 R. R. 46; *Reynell v. Sprye*, 1852, 1 De G., M. & G. 660; *Earle v. Hopwood*, 1861, 9 C. B. N. S. 566). A sale and assignment by a client to his solicitor *pendente lite*, of the subject-matter of the action, is invalid (*Simpson v. Lamb*, 1857, 7 El. & Bl. 84; *Anderson v. Radcliffe*, 1860, 6 Jur. N. S. 578), provided the relationship of solicitor and client exists at the date of the assignment (*Davis v. Freethy*, 1890, 24 Q. B. D. 519; *Rees v. De Bernardby* [1896], 2 Ch. 437). A mortgage of such subject-matter *pendente lite* is not necessarily invalid; but it may be tainted with champerty (*James v. Kerr*, 1888, 40 Ch. D. 449).

Lastly, an assignment may in some cases be invalid as an unregistered bill of sale (*Church v. Sage*, 1892, 41 W. R. 175; 67 L. T. 800; *London and Yorkshire Bank v. White*, 1895, 11 T. L. R. 570). The presence in a contract of an express condition, that it "shall not be assignable in any case whatever," will not prevent an assignment of the beneficial interest thereunder (*In re Turcan*, 1888, 40 Ch. D. 5). The question what effect must be given to an express promise by an assignor, that he will not create any prior charge on the property assigned, is discussed in *Brunton v. Electrical Engineering Corporation* [1892], 1 Ch. 434; *English and Scottish Co. Ltd. v.*

Brunton [1892], 2 Q. B. 700; and *Robson v. Smith* [1895], 2 Ch. 118. An assignment of a thing in action by a person to himself jointly with another person, or by a husband to his wife or by a wife to her husband, alone or jointly with another person, is now, since December 31st, 1881, perfectly valid (44 & 45 Vict. c. 41, s. 50).

V. NECESSITY FOR NOTICE.

An assignment otherwise complete is binding as between assignor and assignee, although no notice has been given to the debtor or holder of the fund. And all persons claiming through or under the assignor will be equally bound by such an assignment, such as a judgment creditor of the assignor (*Beavan v. Lord Oxford*, 1855, 6 De G., M. & G. 507), or a creditor who has obtained a garnishee order even without notice of the assignment (*Pickering v. Ilfracombe Railway Co.*, 1868, L. R. 3 C. P. 235; *Scott v. Lord Hastings*, 1858, 4 Kay & J. 633; *Badeley v. Consolidated Bank*, 1888, 38 Ch. D. 238). Still there are many reasons why an assignor should never omit or delay to give notice of the assignment to the debtor or holder of the fund:—

1. He cannot sue the debtor or holder till such notice has been given; if he desires to sue in his own name, without making the assignor either a co-plaintiff or a co-defendant, he must give notice in writing.

2. If such notice be not given, the debtor or holder may pay over the money to the assignor; and such payment *before notice* would be an answer to any proceeding by the assignee (*Williams v. Sorrell*, 1799, 4 Ves. 389). But the assignor can be compelled to pay over to the assignee the money which he has so received (*In re Patrick* [1891], 1 Ch. 82).

3. The assignee takes subject to all equities which bind the assignor at the date of the notice: hence "the effect of not giving it, is to let in all equities which may exist or be created prior thereto" (*Walker v. Bradford Old Bank*, 1884, 12 Q. B. D. 517).

4. Debts due or growing due to a bankrupt in the course of his business are "goods and chattels" within the reputed ownership clause of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 44 (iii.). Notice of assignment is therefore necessary to take such a debt out of the apparent possession of the bankrupt; and such notice must be given prior to the date of the petition. No other choses in action, however, are now within the clause (see *Colonial Bank v. Whinney*, 1886, 11 App. Cas. 426), and the bankruptcy rules as to reputed ownership are not imported into the winding-up of companies (*Gorringe v. Irwell*, 1886, 34 Ch. D. 128).

5. The assignee of a chose in action is expected in equity to do all he can to complete his title, if only for the protection of innocent third persons. If he neglects to take any step obviously in his power (such as giving notice), and thereby enables the assignor to make a subsequent assignment of the chose in action to a purchaser for value, who takes without notice, his claim will be postponed to that of the subsequent assignee. Thus, if there be more than one assignment of the same chose in action, the assignee who first gives notice to the holder of the fund will obtain priority (*Dearle v. Hall*, 1827, 3 Russ. 1, 48; *Brice v. Bannister*, 1878, 3 Q. B. D. 569; *Johnstone v. Cox*, 1880, 16 Ch. D. 571). There is one exception: equitable charges on shares in registered companies have priority in order of date, irrespective of notice (*Société Générale de Paris v. Walker*, 1885, 11 App. Cas. 20).

For these reasons it is always prudent for the assignee, so far as the

nature of the property admits, to put his mark on it, to show that it belongs to him and no longer to his assignor. Thus, if a trust-fund be assigned, notice should be given to the trustee; if a debt, to the debtor; if a policy of assurance, to the office. Where stock held in trust is assigned, a *distringas* should be obtained. Where the chose in action is a fund in Court, the assignee should obtain a stop-order, otherwise he will be postponed to a subsequent assignee who obtains one (*Mutual Life Co. v. Langley*, 1886, 32 Ch. D. 460). But if notice was given to the trustee while he held the fund, there is no necessity for the assignee to obtain a stop-order, on the fund being subsequently paid into Court; his title was completed on his giving the notice to the trustee (*Livesey v. Harding*, 1856, 23 Beav. 141; *In re Holmes*, 1885, 29 Ch. D. 786).

VI. EQUITIES AFFECTING AN ASSIGNMENT.

The assignee of a chose in action, not transferable at common law, always took in equity, subject to any defences which the debtor or holder would have had against the assignor (*Ord v. White*, 1840, 3 Beav. 357): and by the express words of the Statute a similar liability attaches, in the case of an assignment under the Judicature Act. Thus, if a bond be void as against the assignor, it is void when in the hands of an assignee (*Turton v. Benson*, 1718, 1 P. Wms. 496). If a release for the debt be given by the assignor to the debtor after assignment, but before any notice of assignment has been given, the assignee cannot recover (*Stocks v. Dobson*, 1853, 4 De G., M. & G. 11; 22 L. J. Ch. 884). The assignee of a legacy or of a share in residuary personalty, though for value and without notice, takes subject to the testator's debts (*Hooper v. Smart*, 1875, 1 Ch. D. 90). So, if the debt be payable only on a certain condition, the condition binds the assignee (*Tooth v. Hallett*, 1869, L. R. 4 Ch. 242; *Drew & Co. v. Josolyne*, 1887, 18 Q. B. D. 590). The debtor or holder of the fund, if sued by the assignee, may set-off or counter-claim against him any matter which he could have set-off or counter-claimed against the assignor (*Rolt v. White*, 1862, 31 Beav. 520; 3 De G., J. & S. 360; *Young v. Kitchen*, 1878, 3 Ex. D. 127). And generally the assignee takes subject to the state of accounts between the assignor and the debtor (*Bergmann v. Macmillan*, 1881, 17 Ch. D. 423).

This rule, that "the assignee of a chose in action takes subject to all rights of set-off and other defences which were available against the assignor," is subject to this limitation, "that after notice of an assignment of a chose in action, the debtor cannot, by payment or otherwise, do anything to take away or diminish the rights of the assignee as they stood at the time of the notice" (*per James, L. J.*, in *Roxburghe v. Cox*, 1881, 17 Ch. D. 526; and see *Legh v. Legh*, 1799, 1 Bos. & Pul. 447; *In re Milan Tramways Co.*, 1882, 22 Ch. D. 122; 1884, 25 Ch. D. 587; *Walker v. Bradford Old Bank*, 1884, 12 Q. B. D. 157). But this limitation will not prevent the defendant from availing himself of any set-off which arises, without any fresh act on his part, even after notice of assignment given, out of the same contract or transaction as gave rise to the debt assigned. He is entitled to have all accounts under that one contract taken together once for all, whether there has been an assignment or not (*Bergmann v. Macmillan*, 1881, 17 Ch. D. 423); and if he can show that, when such accounts are properly taken, there will be no balance in favour of the assignor, it would be inequitable to compel him to make any payment to the assignee. The law on this point may be thus stated—

1. Any set-off which the debtor or holder of the fund had against the assignor at the moment he received notice of the assignment is good

against the assignee, whether it arises out of the same contract or any other.

2. The defendant may also avail himself of any set-off or counter-claim which accrues to him after notice, if it arises out of the same contract or transaction as that on which he is sued (*Government of Newfoundland v. Newfoundland Railway Co.*, 1888, 13 App. Cas. 199).

3. But the defendant cannot raise against the assignee any set-off or counter-claim which arises after notice out of an independent contract, whether made before or after notice of assignment (see *Watson v. Mid Wales Railway Co.*, 1867, L. R. 2 C. P. 593; *In re Milan Tramways Co.*, 1884, 25 Ch. D. 587; *Webb v. Smith*, 1885, 30 Ch. D. 192; *In re Asphalte Wood Pavement Co.*, 1885, 30 Ch. D. 216). Special rules apply in the case of an assignment by a defaulting trustee; they will be found in the judgment of Stirling, J., in *Doering v. Doering*, 1889, 42 Ch. D. 203. And see *In re Moss Bay Hematite Co.*, 1892, 8 T. L. R. 475; *Nelson v. Roberts*, 1893, 69 L. T. 352; and *Christie v. Taunton* [1893], 2 Ch. 175.

In all these cases, it must be remembered, the defendant can only use such set-off or cross-claim for his own protection; he cannot recover any money from the assignee. If the amount of the set-off or cross-claim exceeds the amount of the debt assigned, the assignee can recover nothing. But the defendant must sue the assignor for the balance (*Young v. Kitchen*, 1878, 3 Ex. D. 127).

Assigns, or Assignees.—Those who are *assigned*, deputed, or appointed by the act of the party or the operation of law to do any act or enjoy any benefit on their own accounts and risks—an assignee being one that possesses a thing in his own right, but a deputy he that acts in right of another (Perkins). Assignee by deed is when a lessee of a term, etc., sells and assigns the same to another; that other is his assignee by deed; assignee-in-law is he whom the law so makes, without any appointment of the person, as an executor is assignee-in-law to the testator. For the law applicable to assigns, see COVENANT; EXECUTORS AND ADMINISTRATORS; LANDLORD AND TENANT; WILLS.

Assistance, Writ of.—Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession, on filing an affidavit showing due service of such judgment or order, and that the same has not been obeyed (R. S. C., Orders 10 to 12, r. 2).

Under this rule a writ of possession is now substituted for a writ of assistance, whether between parties or as against strangers to the action (*Hall v. Hall*, 1878, 47 L. J. Ch. 680).

The affidavit in support of the writ of assistance required only to show that the order was not complied with within the time limited, and not an existing non-compliance (*Webster v. Taylor*, 1854, 18 Jur. 869).

Writs of assistance were writs of execution, directed by the Court to the sheriff, to enforce a decree or order for the possession of lands, which the defendant refused to perform.

Assize, Clerk of.—See CLERK OF ASSIZE.

Assize, Rents of.—The customary rent service of the freehold and copyhold tenants of manors, when fixed or assized in amount by custom or otherwise, were called *rents of assize*, in distinction to rents that remained arbitrary or variable. They were also called quit-rents, because they were paid instead of all other services, of which the tenant thereby became discharged or quit (Leake, *Uses and Profits of Land*, p. 288).

Assizes.—See **CIRCUITS**.

Assizes, Grand, Petty.—See **CIRCUITS**.

Associates.—Officers of the old common law Courts, or of the circuits (*q.v.*), who were associated with the judges and clerk of assize (*q.v.*) in the commissions of jail delivery, and Nisi Prius. Their duties were to keep the records of the Court; to attend the Nisi Prius sittings; prepare the list of cases; draw the jury ballot; take a note of the judgment; enter the verdict; make up the *postea*; deliver the record to the party entitled thereto; and, generally, to see that all matters relating to the trial of the cause, and the business of the Court, was duly conducted. By the Supreme Court of Judicature (Officers) Act, 1879, the offices of the Associates were amalgamated with the central office, and by rules of December 1887, so much of the Summons and Order Department as had hitherto formed the Court Order Department, for the drawing-up of all orders made in Court, was also amalgamated with the Associates' Department; but by rules of January 1894, the Associates' Department was amalgamated with the Crown Office Department. So that the Associates are now clerks of the Crown Office; and the Statute Law Revision Act, 1894, 57 & 58 Vict. c. 56, repealed the 8th section of the above-mentioned Act of 1879, by which they were named Masters of the Supreme Court. Their appointment is made from either branch of the legal profession, under sec. 9 of the Act of 1879. Their duties remain the same as before that Act, except as enlarged by the rules of December 1887.

As to entry of trials at assizes from District Registries by the Associates, see Order 36, rr. 26 and 27, of Rules of Supreme Court, 1883. The certificate, which has taken the place of the *postea*, is now the authority for the proper officer entering judgment after trials in London, or on circuit. It is obtained in the Associates' Department in the former case; and in the latter, from the London agent of the Circuit Associate, who is generally a country solicitor, or, if a barrister, at his London chambers.

Association, Articles of.—See **COMPANY**.

Association, Memorandum of.—See **COMPANY**.

Association for the Reform and Codification of the Law of Nations.—A society formed in 1873 for objects similar to those which led to the constitution of the **INSTITUTE OF INTERNATIONAL LAW** (*q.v.*). It differs from the latter in the number of its members

being unlimited, and in all persons being eligible for membership; is like it, in meeting in different countries.

A report is published after each meeting. There are now fourteen volumes of such reports, many of them containing valuable matter for international jurists. At the last meeting, held in 1895 at Brussels, the name was changed to International Law Association.

Associations, Unlawful,—See SOCIETIES, UNLAWFUL.

Assumpsit.—This was one of the old forms of action which were swept away by the Judicature Acts. It was originally a species of "trespass on the case" (see ACTION ON THE CASE), but in more modern times was looked upon as a distinct cause of action (Stephen on *Pleading*, 7th ed., p. 13, note (u)). It was called *assumpsit* from the fact that, when the pleadings were in Latin, that word was always used by the plaintiff in his declaration as descriptive of the defendant's undertaking or promise (Chitty on *Pleading*, 7th ed., vol. i. p. 110). *Assumpsit* was an action for the recovery of damages, whether liquidated or unliquidated, for the breach of a contract not under seal (see *First Report of the Common-Law Commissioners*, 1851, p. 31). It lay for the breach of any *parol* or *simple* contract, either express or implied, and whether made orally or in writing (Chitty on *Pleading*, 7th ed., p. 111). Claims in actions of *assumpsit* were divided into what were known as *special counts* and *indebitatus counts* (*ibid.* p. 295). A special count consisted, in general, of a statement of the contract on which the action was founded, either in the terms in which it was made or according to the legal effect of those terms, and, after averring the fulfilment of all conditions which were required in order to entitle the plaintiff to have the contract performed, proceeded to assign the particular breach of the contract which was complained of, and to allege any special damage suffered in consequence of such breach (Bullen and Leake, *Precedents of Pleading*, 3rd ed., p. 58 *et seq.*).

In general, *special counts* in *assumpsit* were employed in cases where damages were sought to be recovered for the non-performance of a *parol* or *simple* contract,—as, for instance, in actions against a vendor for not delivering goods bought, or against a vendee for not accepting goods sold, or in actions for breach of promise of marriage, or for breach of a warranty of the quality of goods sold (*ibid.* p. 114). These *special counts* were not, however, restricted to cases in which mere damages were sought to be recovered, but might also, in general, be used for the recovery of *simple* contract debts where it was desirable, for the purpose of obtaining admissions or for other reasons, to set out the terms of the contract (*ibid.* p. 295).

An *indebitatus count* stated the cause of action by a general description, reserving the particular circumstances of the debt to be given in evidence, and to be explained, where necessary, by particulars of demand (Bullen and Leake, *Precedents of Pleading*, 3rd ed., p. 35).

The *indebitatus counts* were employed in ordinary cases of *simple* contract where the claim was of a mere pecuniary nature, and was founded upon an executed consideration (*ibid.* p. 295; Wm. Saund. 1871 ed., vol. i. p. 366, note (n); and see CONTRACT); or, in other words, where a *simple* contract, express or implied, resulted in a money debt, and nothing remained to be done but to pay the amount (Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 58). The *indebitatus counts* most frequently in use were in respect of

debts for goods sold and delivered, goods bargained and sold, work done, money lent, money received, money paid, interest, and upon accounts stated. These counts were termed *common counts* or *common indebitatus counts* (*ibid.*, p. 35; Selwyn's N. P., 11th ed., p. 71), and in practice they were often joined with a special count founded upon the same cause of action.

Assumpsit, being an action on the case, was within the Statute of Limitations, 21 Jac. I. c. 16, s. 3, and could only be commenced and sued within six years next after the cause of such action (2 Wm. Saund., 1871 ed., pp. 391, 395; *Gibbs v. Guild*, 1881, 8 Q. B. D., p. 302; 9 *ibid.*, p. 67). See LIMITATION.

Assurance.—See ACCIDENT, BURGLARY, FIRE, LIFE, MARINE, and SICKNESS, ASSURANCE OR INSURANCE.

Assurance (of Personal Chattels).—See BILLS OF SALE.

Assurances.—The word *assurance* is used to denote and comprise every act in the law, and every instrument, whereby any estate or interest in realty may be conveyed *de novo* to a stranger, or whereby any estate or interest which is liable to impeachment or defeasance may be discharged from such liability, or whereby any estate or interest may be enlarged into a greater estate or interest. The general subject of assurances may be divided in various ways. The fourfold division of Blackstone into (1) by matter *in pais*, (2) by matter of record, (3) by special custom, and (4) by devise, is well known (2 Black. Com. 294). At the present day, when assurances by matter of record have been abolished, this division is no longer applicable. It is possible that the best method of exhibiting the nature of the principal assurances, whether comprised or not comprised in the modern practice, may be found in reviewing them with regard to the source from which they respectively derive their power and validity. From this point of view they may be divided into (I.) Assurances taking effect by force of the common law; (II.) Assurances taking effect by force of the custom of particular places; and (III.) Assurances taking effect by force of particular statutes.

(I.) Assurances taking effect by force of the common law are divisible into—(1) Assurances by matter of record, which are (a) fines, and (b) common recoveries; and (2) Assurances by matter *in pais*, a phrase which signifies in the country, and, according to the common interpretation quoted by Blackstone, upon the particular land to which they related. These are—(a) a feoffment, by which alone estates in corporeal hereditaments in possession could be conveyed; (b) a grant by deed, for the conveyance of incorporeal hereditaments, including estates in reversion, and in remainder, in corporeal hereditaments; (c) an exchange; (d) a release; (e) a confirmation; (f) a lease, or demise; and (g) a surrender. Information in detail relating to these different kinds of assurances cannot here be given, but will be found under their separate headings. Here it may be observed, that since a feoffment took effect at common law by mere delivery of the seisin, without the delivery or execution of any deed or other instrument, this supplies the reason for the introduction of the words “act in the law” into the above-given definition of an assurance.

(II.) With regard to assurances taking effect by force of the custom of particular places, it is to be observed that such customs, being in derogation from the common law, can exist in counties, honours, cities, boroughs, hundreds, and manors, but not in places or localities of less dignity and importance (Co. Lit. 110 *b*, and Harg. note 2 thereon). Otherwise the common law, which is styled by Lord Coke "the common custom of the realm," would practically cease to exist. The most important and best known of these local customs relating to the validity of assurances, was the custom of devising lands by will; which was very commonly found in boroughs, in connection with that species of socage called burgage tenure, by which the burgesses held their freehold lands and tenements (Lit. s. 162). - This supplies an example of a distinct species of assurance, unknown to the common law, but valid in particular places by virtue of local custom. Local custom more commonly affected the validity of assurances, by in some way enlarging or otherwise qualifying the effect of assurances, such as feoffments, which were well known to the common law. Of this, the most important and best-known example is the custom of the county of Kent, in connection with gavelkind lands, that an infant, whether male or female, not being below the age of fifteen years, and being seised in fee-simple by descent, may indefeasibly alienate them by feoffment; at all events for valuable consideration (Rob. Gav. pp. 248, 249). The effect of the custom here is to enlarge the operation of the feoffment by its extension to cases not permitted by the common law. Sometimes local customs are found to affect common-law assurances by way of restriction. It was held in *Perryman's Case*, 5 Rep. 84, that a custom in the manor of Porchester, that a feoffment of lands held of the manor should be void unless presented at the next manor Court, was a good custom. Lord Coke, in his report of that case, also mentions a custom of Lidford Castle, in the county of Kent, that a freeholder of inheritance cannot pass his freehold, except by surrender and admittance; but it is perhaps uncertain whether lands subject to such a custom would at this day be regarded as true freeholds.

(III.) The subject of assurances taking effect by force of particular statutes would supply material for a considerable treatise. Here it is only possible to give an outline of the most salient divisions of the class. —(1) So far as regards the bulk of the lands in the kingdom, a will comes under this head; for there existed no general power to devise lands until the enabling statutes, 32 Hen. VIII. c. 1, followed by the explanatory Act, 34 & 35 Hen. VIII. c. 5, which are commonly called the Statutes of Wills. They are now superseded by the Wills Act, 1837, 7 Will. IV., and 1 Vict. c. 26; and in addition there exist a number of other Acts and enactments, which affect the wills of special classes of persons, such as 24 & 25 Vict. c. 114, relating to wills made by British subjects abroad, and certain parts of the Married Women's Property Acts, relating to the wills of married women; or which affect all wills in certain limited respects, such as the Thellusson Acts, 39 & 40 Geo. III. c. 98, restricting the power of accumulation. (2) The Statute of Uses, as is well known, gave rise to a whole system of conveyancing, which owes its operation wholly or partly to the statute; and a great part of the modern practice still rests upon this foundation. This statute also gave rise to two kinds of assurances which, so far as the conveyance of the legal estate is concerned, were completely novel; namely, a Bargain and Sale (*q.v.*), and a Covenant to Stand Seised (*q.v.*). (3) Every assurance made in practice at the present day of a freehold in possession, owes a part at least of its validity to the Act 8 & 9 Vict.

c. 106, s. 2, which enacts that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. This Act had been preceded by certain tentative enactments tending in the same direction, 4 & 5 Vict. c. 21, s. 1, and 7 & 8 Vict. c. 76, s. 2, now repealed. (4) Assurances made by married women and their husbands derive a part of their validity from the Fines and Recoveries Act, 1833, 3 & 4 Will. iv. c. 74, s. 77 *et seq.* (see ACKNOWLEDGMENT OF DEEDS); and assurances (other than instruments, whether wills or other appointments, made in exercise of a power) made either by women married after the 1st January 1883, or by women, whenever married, of property to which they become entitled after that date, owe their validity to the Married Women's Property Acts. (5) Assurances made by tenants for life, under the statutory powers conferred by the Settled Land Acts, owe their validity to sec. 20 of the Act of 1882. (6) There are in existence a number of enactments authorising conveyances to be made to or by particular persons, or bodies of persons, for particular purposes; such as 5 & 6 Will. iv. c. 69, s. 6, relating to conveyances made by overseers and guardians of the poor.

It would be very difficult, and perhaps would serve no adequate purpose, to attempt an exhaustive treatment in detail of the subject of this article, even if space permitted such treatment. The triple outline above given will suffice to suggest the heads under which inquiry should be pursued in any particular case. It will be seen to be possible for a given assurance to depend for its validity, partly upon the common law, partly upon local custom, and partly upon one or more statutes.

Asylum (Lat. *asylum*; Gr. ἀσύλον, fr. ἀ, *priv.*, and σύλον, *spoil*).—A sanctuary or place where there is safety from pursuit.

In ancient times, criminals were safe while within the bounds of temples and other sacred places, and out of this custom sprang a similar one of treating the precincts of Christian churches as places of refuge (see SANCTUARY).

The term has now passed into current usage, with the meaning of hospital, or place of shelter for the unfortunate, destitute, and insane. See ASYLUMS.

In international law the word has retained its old sense of a place of safety from pursuit. Thus the territory of a foreign State is an asylum for refugees, subject, however, to treaties of EXTRADITION (*q.v.*), and the right of EXPULSION (*q.v.*).

Another application of the term in international law is the cover extended by neutral territory to belligerent fugitives. The practice of States in this respect is fairly well defined, and differs when naval, as distinguished from land forces, are concerned.

The practice as regards land forces is as follows:—The neutral State may not allow its territory to serve for the purposes of a war between States with which it is at peace, but it may at all times receive individuals belonging to the belligerent States, and even belligerent forces, provided its hospitality and position as a neutral be respected. It is incumbent on the neutral State to take precautions to insure such respect and guard against the belligerent forces resuming hostilities. It is therefore usual to disarm refugee forces, and keep them under close supervision until the end of the war.

In maritime warfare the obligations of the neutral State are dif-

ferent. Thus a belligerent war vessel may seek refuge in a neutral port, and there undergo repair and take in coal and provisions, and the neutral State, in not preventing such vessel from resuming war operations, does not commit a breach of the law of nations. A rule, however, has grown up in the private law and practice of States, where hostile vessels meet in the same neutral port, of forbidding the one belligerent vessel to sail within twenty-four hours after the departure of the other. To prevent the abuse, moreover, of this right of refuge, a further rule was adopted by Great Britain in 1861, and repeated in 1870, requiring any belligerent vessel entering a British port, to put to sea within twenty-four hours after entrance, except in case of stress of weather, or of her needing provisions or things necessary for the subsistence of the crew, or repairs, in any of which cases she was to be required to put to sea as soon as possible after expiry of twenty-four hours.

Asylums.—It is proposed in this article to treat the law of lunacy and the law of local government in all their relations to the existing asylum system of England, using the term asylum, not in the restricted definition of it given in the Lunacy Act, 1890, as “an asylum for lunatics provided by a county or borough, or by a union of counties and boroughs” (s. 341), but in its wider and more general sense, as including every receptacle for the insane. The jurisdiction in lunacy and the civil capacity and criminal responsibility of the insane will be dealt with under LUNACY.

The present inquiry is as wide in range as it is important in character. It embraces, *inter alia*, an examination of the various modes in which insane persons are committed to an institution for lunatics, or placed under care, of their treatment, of the means by which, and the circumstances under which, they can be released or discharged, of the system of asylum administration and visitation, and an analysis of the powers and duties of local authorities in regard to the provision and maintenance of asylums. The subjects of criminal lunatic asylums, and of the effect of detention in an asylum on the settlement of pauper lunatics, also fall within its purview.

Reception of Lunatics.—Reception Orders on Petition.

Subject to the exceptions of urgency cases (see *infra*) and criminal lunatics (see *infra*), a person, not being a pauper or a lunatic so found by inquisition, cannot be received and detained as a lunatic in an institution for lunatics, or as a single patient, unless under a reception order made by “the judicial authority”—a term which will be explained immediately. A relative of the person applying for an order, or of the lunatic, or of the husband or wife of the lunatic, is not capable of making such order (s. 4, subs. (1)).

The detention of a lunatic is justifiable at common law if necessary for his safety or the safety of others (*Brookshaw v. Hopkins*, 1773, Lofft, 235-240; *Anderson v. Burrows*, 1830, 4 C. & P. 210; *Scott v. Wakem*, 1862, 3 F. & F. 328; *Symm v. Fraser*, 1862, *ibid.* 859).

The term “single patient” is impliedly defined by sec. 315. No licence is necessary for the reception and detention of a single patient. The provisions of the Act with reference to single patients must, however, be complied with. See Commissioners’ Circular as to, 1895. There is nothing

in the Act to prevent the relatives of a lunatic from keeping and taking care of him. But the income of such a lunatic cannot be dealt with otherwise than under the authority of the jurisdiction in lunacy. See LUNACY.

The order is obtained upon a private application by petition, accompanied by a statement of particulars and by two medical certificates on separate sheets of paper (s. 4, subs. (2)). As to requisites of medical certificates, see *infra*.

The petition is to be presented, if possible, by the husband or wife or by a relative of the alleged lunatic. If not so presented, it must contain a statement of the reasons why the petition is not so presented, and of the connection of the petitioner with the alleged lunatic, and the circumstances under which he presents the petition.

This provision has a double object: first, to secure the presentation of the petition by a responsible person; and secondly, to lay a basis for an undertaking by the petitioner as to visitation.

There are cases in which the signature of the husband or wife or a relative of an alleged lunatic could not be obtained, if at all, in time. "For example," say the Commissioners in Lunacy in their 33rd Annual Report at p. 129, "a foreigner, in good or fair circumstances, becomes insane, and unless his banker or agent, his fellow-clerk, or the landlord of his hotel comes forward to sign the order, he must be treated, to his manifest disadvantage, as a lunatic wandering at large or not under proper care or control, and must be sent, through the police or a relieving officer, to a pauper asylum, with, in all likelihood, especially in London, a preliminary detention in a workhouse."

In addition to the particulars mentioned in the subsection, an urgency order made before a petition is presented must be referred to in the petition (s. 11, subs. (5)). Moreover, if a previous petition has been dismissed, the facts relating to it, so far as known to the petitioner, must be given (s. 7, subs. (4)).

The wilful misstatement of any material fact in a petition is a misdemeanour (s. 317, subs. (1)).

No person is competent to present a petition unless he is at least twenty-one years of age, and has within fourteen days before the presentation of the petition personally seen the alleged lunatic (s. 5, subs. (2)).

The date on which the petition is presented is excluded; that on which the petitioner last saw the alleged lunatic is included. "Days" means all days, including Sundays, etc.

The petitioner undertakes in the petition that he will personally, or by someone specially appointed by him, visit the patient once at least in every six months; and the undertaking is recited in the order.

The petition is signed by the petitioner, and the statement of particulars by the person making the statement (s. 5, subs. (4)).

On the presentation of the petition the judicial authority considers the allegations in the petition and statement of particulars and the evidence of lunacy appearing by the medical certificates, and whether it is necessary for him personally to see and examine the alleged lunatic; and, if he is satisfied that an order may properly be made forthwith, he may make it. If he is not so satisfied, he appoints as early a time as practicable, not being more than seven days after the presentation of the petition, for its consideration; and he may make such further or other inquiries concerning the alleged lunatic as he may think fit. Notice of the time and place appointed for the consideration of the petition (unless personally given to

the petitioner) shall be sent to the petitioner by post in a prepaid registered letter addressed to him at his address as given in the petition.

The answers in the statement of particulars are not to be dissociated from the context, dissected into parts, and read as to each of those parts as if it had no relation to or dependence upon the rest. The statement will be construed as a whole, and if any dispute as to its sufficiency arise, the question will be whether, properly understood by a reasonable mind, it gives or does not give all the particulars which are required (*Lowe v. Fox*, 1887, 12 App. Cas. 206). The case from which this proposition is taken was decided under the Lunacy Act of 1853, 16 & 17 Vict. c. 96, sched. A, No. 1. But it is still valuable as an illustration. The plaintiff was taken to and detained in the defendant's asylum as a person of unsound mind, under an order signed by her husband, and containing a statement of questions and answers concerning her. To the question "Age," the answer was "Fifty." To the question "Whether first attack," the answer was "For the last twenty years has been subject to what is termed hysteria." To the question "When and where previously under care and treatment," the answer was "During this period of twenty years has been constantly under treatment." The House of Lords, affirming the decision of the Court of Appeal, held that the answers were sufficient and not misleading. If the lady had been subject to, and under treatment for, hysteria for twenty years, this was a fact which the person making the statement of particulars was entitled and bound to disclose. He mentioned the hysteria specifically, and excluded from his answer as to previous treatment all reference to "care," a term which would be applicable to patients under the care of a person who would restrain their liberty.

The fact that the judicial authority has or has not seen the patient is stated in the reception order (see Form 3, sched. ii.). In the latter case the alleged lunatic has a qualified right to demand examination by another judicial authority (see s. 8, subs. (1)).

The judicial authority, if not satisfied with the evidence of lunacy appearing by the medical certificates, may, if he thinks it necessary so to do, visit the alleged lunatic at the place where he may happen to be (s. 6, subs. (2)).

The petition is considered in private, and no one except the petitioner, the alleged lunatic (unless the judicial authority shall in his discretion otherwise order), any one person appointed by the alleged lunatic for that purpose, and the persons signing the medical certificates accompanying the petition, may, without the leave of the judicial authority, be present at the consideration thereof (s. 6, subs. (3)).

At the time appointed for consideration of the petition the judicial authority may make an order on it or dismiss it, or, if he thinks fit, may adjourn the case for any period not exceeding fourteen days for further evidence or information.

Every judicial authority has the same power as regards the summoning and examination of witnesses, the administration of oaths, and otherwise—a term which would include costs,—as if he were acting in the exercise of his ordinary jurisdiction (s. 9, subs. (2)).

A County Court judge or a stipendiary magistrate is not required to act as a judicial authority so as to delay, or interfere with, the exercise of his ordinary jurisdiction (s. 9, subs. (3)). And as to how this exemption is to be claimed, see Lord Chancellor's and Home Office Rules.

Every judicial authority and all persons admitted to be present at the consideration of any petition for a reception order, or otherwise having

official cognisance of the fact that a petition has been presented, except the alleged lunatic and the person appointed by the alleged lunatic, is bound to keep secret all matters and documents which may come to his or their knowledge by reason thereof, except when required to divulge the same by lawful authority (s. 6, subs. (5)).

An obligation of secrecy is imposed on the Commissioners, except when removed by "lawful authority," or by their sense of what is necessary for the better execution of their duties, or by the dismissal of a petition or the release of a lunatic, in so far as they think fit (s. 7, subs. (3)).

An obligation of secrecy is imposed on the judicial authority, except when removed by "lawful authority," as, for instance, under sec. 7, subs. (2).

An obligation of secrecy is imposed on the secretary and clerks to the Lunacy Commissioners, or assistants to clerk of visitors, except when removed by "lawful authority."

In *Hill v. Philp*, 1852, 7 Ex. Rep. 232, a case decided under the Lunacy Act, 1845, an order for inspection of documents was held to be *legal* authority. An order for interrogatories, or for production of documents, would fall within the same category. The word *lawful* was probably used as being wider than *legal*.

If the petition is dismissed, the judicial authority delivers to the petitioner a statement in writing under his hand of his reasons for dismissing it, and sends a copy of such statement to the Commissioners in Lunacy, and also, where the alleged lunatic is detained under an urgency order, sends notice by post or otherwise to the person in whose charge the alleged lunatic is, that the petition has been dismissed (s. 7, subs. (1)).

When an order has been made, the lunatic may be received into any institution for lunatics, and the reception order, if in form and accompanied by the requisite medical certificates, is a sufficient authority for his reception.

When a lunatic has been received as a private patient under an order of a judicial authority, without a statement in the order that the patient has been personally seen by the judicial authority, the patient has a right to be taken before or visited by a judicial authority, other than the judicial authority who made the order, unless the medical officer of the institution, or, in the case of a single patient, his medical attendant, within twenty-four hours after reception, in a certificate signed and sent to the Commissioners in Lunacy, states that the exercise of such right would be prejudicial to the patient (s. 8, subs. (1)).

The lunatic is entitled to notice of his right to demand an interview within twenty-four hours after reception, and a manager of an institution or person in charge of a patient failing, whether wilfully or otherwise, to give such notice imposed upon him by this section is guilty of a misdemeanour (s. 8, subs. (5)). As to punishment of misdemeanour where no special punishment is prescribed, see Stephen, *Dig. Crim. Law*, art. 22; and *Dunn v. R.*, 1848, 12 Q. B. 1041.

The judicial authority, after personally seeing the patient, reports his opinion to the Commissioners in Lunacy, who may take such steps as may be necessary to give effect to the report (s. 8, subs. (3)).

The Judicial Authority defined.—The judicial authority for the purposes of the Act is a justice of the peace specially appointed by the justices of every county and quarter sessions borough annually, or a judge of county courts, or magistrate, the two last of whom, however, may decline to act if doing so would interfere with their ordinary jurisdiction (see ss. 9, 10, 11 of Act of 1890, and 24 and 25 of Lunacy Act, 1891).

The judicial authority has the same jurisdiction and power as regards

the summoning and examination of witnesses, the administration of oaths, and is assisted by the same officers, as if he were acting in the exercise of his ordinary jurisdiction (s. 9, subs. (2)).

Reception under Urgency Orders.

In cases of urgency where (and only where, see *In re Cathcart* [1893], 1 Ch. 475) it is expedient, either for the welfare of a person (not a pauper) alleged to be a lunatic, or for the public safety, that the alleged lunatic should be forthwith placed under care and treatment, he may be received and detained in an institution for lunatics, or as a single patient upon an urgency order (in force for seven days, or, if a petition for a reception order is pending, till it is finally disposed of (s. 11, subs. (6)), made (if possible) by the husband or wife or by a relative of the alleged lunatic, accompanied by one medical certificate (s. 11, subs. (1)). If not related to the patient, the person signing the order must state the reason why the order is not signed by a relation, his or her connection with the patient, and the circumstances under which he or she signs (s. 11, subs. (3)).

No person may sign an urgency order unless he is at least twenty-one years of age, and has within two days before the date of the order personally seen the alleged lunatic (s. 11, subs. (4)).

Procedure by way of urgency order was borrowed from the Scotch "emergency certificate."

Reception after Inquisition.—A lunatic so found by inquisition (see LUNACY) may be received in an institution for lunatics or as a single patient upon an order signed by the committee of the person of the lunatic, or if no committee has been appointed, upon an order signed by a Master in Lunacy (s. 12).

Summary Reception Orders.—A summary reception order is an order for the reception of a lunatic, made by a justice otherwise than upon petition (s. 19). There are four classes of cases in which such orders are made—

(1) Lunatics not under proper care and control, or cruelly treated or neglected.

(2) Resident pauper lunatics.

(3) Lunatics wandering at large.

(4) Lunatics in workhouses who are proper subjects to be removed to an asylum.

(1) *Lunatics not under Proper Care, etc.*—Any such justice upon the information on oath of any person whomsoever, that a person, not a pauper and not wandering at large, is deemed to be a lunatic and is not under proper care and control, or is cruelly treated or neglected as aforesaid, may himself visit the alleged lunatic, and shall, whether making such visit or not, direct and authorise any two medical practitioners whom he thinks fit to visit and examine the alleged lunatic and to certify their opinion as to his mental state, and the justice shall proceed in the same manner so far as possible, and have as to the alleged lunatic the same powers, as if a petition for a reception order had been presented by the person by whom the information with regard to the alleged lunatic has been sworn (s. 13, subs. (2)).

Upon the certificates of the medical practitioners who examine the alleged lunatic, or after such other and further inquiry as the justice thinks necessary, he may by order direct the lunatic to be received and detained in any institution for lunatics to which, if a pauper, he might be sent, and the constable, relieving officer, or overseer upon whose information the order has been made, or any constable whom the justice may require so to

do, shall forthwith convey the lunatic to the institution named in the order (s. 13, subs. (3)). A constable, relieving officer, or overseer whose duty it is, under the Act of 1890, to convey a lunatic to or from an institution for lunatics, may make proper arrangements for the performance of the duty by some other person or persons (Act of 1891, s. 2, subs. (1)).

The order, if in proper form, is a sufficient authority for the reception and detention of the lunatic (s. 35, subs. (1)). Its execution may, however, be suspended, or the lunatic may be temporarily removed to the workhouse. Except in such cases, however, the order ceases to be operative unless the lunatic is received under it within seven clear days (see CLEAR DAYS) from its date (s. 36, subs. (3)).

(2) *Resident Pauper Lunatic*.—Every medical officer of a union who has knowledge that a pauper resident within the district of the officer is or is deemed to be a lunatic and a proper person to be sent to an asylum, must, within three days after obtaining such knowledge, give notice in writing to the relieving officer of the district, or, if there is no such officer, to an overseer of the parish where the pauper resides (s. 14, subs. (1)).

The medical officer need not go further than common report, in his notice, either as to the alleged lunacy or as to the propriety of sending the party to an asylum.

Every relieving officer and every overseer of a parish of which there is no relieving officer, who respectively have knowledge, either by notice from a medical officer or otherwise, that any pauper resident within the district or parish of the relieving officer or overseer is deemed to be a lunatic, is required, within three days after obtaining such knowledge, to give notice thereof to a justice having jurisdiction in the place where the pauper resides (s. 14, subs. (2)).

Lunacy is not sickness within the meaning of art. 215 of the General Consolidated Order, so as to entitle the relieving officer to give the lunatic medical relief.

If a constable, relieving officer, or overseer is satisfied that it is necessary for the public safety or the welfare of an alleged lunatic with regard to whom it is his duty to take proceedings, that the alleged lunatic should be placed under care and control, he may remove the alleged lunatic to the workhouse of the union in which he is, and the master of the workhouse, unless there is no proper accommodation in the workhouse for the alleged lunatic, may "receive and relieve, and detain" the alleged lunatic therein. No person is to be so detained for more than three days, and before the expiration of that time the constable, relieving officer, or overseer must take such proceedings with regard to the alleged lunatic as are required by this Act (s. 20).

Either deficiency of room or absence of proper arrangements for the care and control of a dangerous lunatic would be a sufficient ground for refusal. If the master of the workhouse refuse to receive the lunatic on the ground of want of proper accommodation, steps should be at once taken to bring the lunatic before a justice, who may (a) if he think fit, inquire into the circumstances, and if satisfied that there is proper accommodation, deal with the case under sec. 21; or (b) send the lunatic to an asylum, under sec. 16, if he consider that the case is not a workhouse one.

The words "relieve" and "alleged" give the master of the workhouse authority to incur and recover necessary outlay on behalf of the party brought to him for reception and detention, even if the latter is found by the justices not to be a lunatic at all. Independently of this enactment, however, such expenses are recoverable as "necessaries" at common law.

Any justice may make an order for removal of a lunatic to a workhouse in any case where a summary reception order might be made, if he is satisfied that it is expedient for the welfare of the lunatic, or for the public safety, that the lunatic should forthwith be placed under care and control, and if it appears to him that there is proper accommodation for the lunatic in that workhouse (s. 21, subs. (1)).

Authority to "relieve" is implied in the order to take charge of and detain the lunatic, and expenses incurred in relieving the lunatic are recoverable as "necessaries," even if the party is afterwards found to be sane (*West Ham Union v. Pearson*, 1890, 62 L. T. 638).

The justice, upon receiving the notice, has the alleged lunatic brought before him or some other justice having jurisdiction in the place where the pauper resides, within three days (s. 14, subs. 3). The justice has power to examine the alleged lunatic at his own house or elsewhere (s. 17). In *R. v. Whitfield*, 1885, 15 Q. B. D. 122, the justices endeavoured to see the alleged lunatic at a library where he happened to be, in order to avoid remark.

(3) *Lunatics wandering at large*.—Every constable and relieving officer and every overseer of a parish who has knowledge that any person (whether a pauper or not) wandering at large within the district or parish of the constable, relieving officer, or overseer is deemed to be a lunatic, must immediately apprehend and take the alleged lunatic, or cause him to be apprehended and taken before a justice (s. 15, subs. (1)).

Wandering at large means wandering aimlessly without any definite ideas as to destination.

The justice before whom a pauper alleged to be a lunatic or an alleged lunatic wandering at large is brought is required to call in a medical practitioner and examine the alleged lunatic, and make such inquiries as he thinks advisable, and if upon such examination or other proof the justice is satisfied in the first-mentioned case that the alleged lunatic is a lunatic and a proper person to be detained, and in the secondly-mentioned case, that the alleged lunatic is a lunatic, and was wandering at large, and is a proper person to be detained, and if in each of the foregoing cases the medical practitioner who has been called in signs a medical certificate with regard to the lunatic, the justice may by order direct the lunatic to be received and detained in the institution for lunatics named in the order (s. 16).

A lunatic sent to an institution for lunatics under this provision is classified as a pauper, until it is ascertained that he is entitled to be classified as a private patient (Act of 1891, s. 3).

Any justice, whether specially appointed or not, upon the information upon oath of any person that a person wandering at large within the limits of his jurisdiction is deemed to be a lunatic, may by order require a constable, relieving officer, or overseer of the district or parish where the alleged lunatic is, to apprehend him and bring him before the justice making the order, or any justice having jurisdiction where the alleged lunatic is (s. 15, subs. (2)).

The examination must be a *real* one, i.e. an examination made personally and *bond fide* by the justice for the purpose of satisfying himself as to the sanity or insanity of the person examined. The time, and place, and manner, and character, and duration of the examination are one and all left to his discretion, and he will not be considered as having acted without jurisdiction by reason only of his having made a less full and complete examination than the Court may think he ought to have made. Nor is it necessary that the medical practitioner above referred to should be actually

present when the justice sees and personally examines the alleged lunatic, or that the latter should be made aware of the object of the examination. "The language," [of the section], said Lindley, L. J., in *R. v. Whitfield*, 1885, 15 Q. B. D. 149, 150, "does not point to anything like such an investigation as takes place under a writ *de lunatico inquirendo*. The object of the statute is not to enable justices to adjudicate a person to be *non compos mentis*, but to enable them to place under proper care and control persons who they are satisfied are lunatics, and require to be so placed. They have to act in cases of emergency and of great danger, as well as in other cases; their measures are precautionary measures only; if they make a mistake, it can soon be corrected. . . . Moreover, it must never be forgotten, in dealing with the insane, that the whole object of such an examination as justices could be expected to make, would frequently be frustrated by informing the insane person that justices were about to examine him with reference to his insanity. The statute has given justices of the peace and medical men large powers; but the statute is based upon the theory that they can be trusted."

A justice is not to sign an order for the reception of a person as a pauper lunatic into an institution for lunatics, or workhouse, unless he is satisfied that the alleged pauper is either in receipt of relief, or in such circumstances as to require relief for his proper care. A person who is visited by a medical officer of the union, at the expense of the union, is, for the purposes of this section, to be deemed to be in receipt of relief (s. 18).

In the case of a lunatic as to whom a summary reception order may be made, a relation or friend may retain or take the lunatic under his own care if a justice having jurisdiction to make the order, or the visitors of the asylum in which the lunatic is or is intended to be placed, is satisfied that proper care will be taken of the lunatic.

The limitation of the definition of "relative" in the case of the presentation of petitions (see s. 6, subs. (1)) or the signing of reception orders (s. 11, subs. (1)) is intelligible enough. But here the policy of the Act is to encourage offers on the part of any relation or friend of an alleged lunatic to undertake to maintain him; and therefore, as the justice must be satisfied that proper care of the lunatic will be taken, there can be no objection to making the definition of relation as wide as possible.

Reception Order by two Commissioners in Lunacy.—Any two or more Commissioners may visit a pauper lunatic or alleged lunatic not in an institution for lunatics or workhouse, and may make a reception order on the certificate of a medical practitioner.

(4) *Lunatics in Workhouses.*—Except in the cases mentioned below, no person is allowed to remain in a workhouse as a lunatic unless the medical officer of the workhouse certifies in writing—(a) that such person is a lunatic, with the grounds for the opinion; and (b) that he is a proper person to be allowed to remain in a workhouse as a lunatic; and (c) that the accommodation in the workhouse is sufficient for his proper care and treatment, separate from the inmates of the workhouse not lunatics, unless the medical officer certifies that the lunatic's condition is such that it is not necessary for the convenience of the lunatic or of the other inmates that he should be kept separate.

The excepted cases are—(1) the urgent cases referred to in ss. 20 and 21; (2) the case of a pauper suffering from mental disease as to whom before the commencement of the Act of 1890 an order has been made under sec. 22 of the Poor Law Amendment Act, 1867 (see s. 4, subs. 1 of the Act of 1891); (3) the case of a lunatic detained in an asylum provided

under the Metropolitan Poor Act, 1867, where no certificate as to sufficiency of accommodation is required (Act of 1891, s. 4, subs. (2)); and (4) the case of a lunatic transferred to such an asylum from a workhouse while a certificate or order made in regard to him there is in force. Here no further certificate or order is required for his detention (*ibid.*). (2), (3), and (4) arise under the Act of 1891, but that statute is to be construed as one with the Act of 1890 (see s. 1 of the Act of 1891). No lunatic is to be detained for more than fourteen days in a workhouse against his will, except under the order of a justice (s. 24), supported by the certificate of a medical practitioner (s. 24, subss. (3) and (4)) not an officer of the workhouse, and by the certificate of the medical officer.

There are to be attached to every order made by a justice under s. 24 of the Act of 1890 the medical certificates on which such order is founded (s. 5, Act of 1891). This last provision facilitates the keeping of the orders and certificates together for inspection by the Commissioners in Lunacy.

Where a pauper lunatic is discharged from an institution for lunatics, and the medical officer of the institution is of opinion that the lunatic has not recovered, and is a proper person to be kept in a workhouse as a lunatic, the medical officer shall certify such opinion, and the lunatic may thereupon be received and detained against his will in a workhouse without further order on the certificate of the medical officer of the workhouse (s. 25).

Chronic lunatics, not being dangerous, who are in an asylum and have been selected and certified by the manager of the asylum as proper to be removed to the workhouse, may be so removed by order of the visitors of the asylum, with the consent of the Local Government Board (s. 26, subs. (1)).

The object of the subsection is to enable visitors, by the removal of chronic patients, to make provision for the removal into asylums of all recent and probably curable cases. The application must originate with visitors. No application received directly from a Board of Guardians can be entertained (Minute, 25th November 1863, 18th Rep. Commissioners in Lunacy, 74).

Lunatics so received under this section continue patients on the books of the asylum for the purposes of the Act of 1890, so far as it relates to lunatics removed to asylums (*ibid.* subs. (2)).

These purposes are: the removal of a lunatic to a workhouse under this section is not to affect his subsequent treatment (ss. 39–53), removal (ss. 58 *et seq.*), discharge (ss. 72 *et seq.*), or chargeability (ss. 286 *et seq.*), or the rights of the guardians in regard to his property (ss. 299, 300). As to examination of lunatics in workhouses, see Circular of L. G. B., 1st June 1896.

Institutions in which Lunatics may be received.—Subject to the restrictions—(1) that a lunatic is not to be sent to an asylum out of the place from which he is sent unless on the ground of deficiency of room or for special circumstances (s. 27, subs. (2)); (2) that a pauper lunatic is not to be received into an asylum other than an asylum belonging wholly or in part to the county or borough in which the place where he is or is settled is situated, except under a subsisting contract (subs. (3)); every summary reception order, and every reception order made by two or more Commissioners, may authorise the reception of the lunatic named in the order not only into an asylum of the county or borough in which the place from which the lunatic is sent is situate, but also into any other institution for lunatics. As to workhouses situate in county, not including union, see Lunacy Act, 1891, s. 6.

As to removal of lunatic becoming pauper, see Act of 1891 (see s. 19).

Requirements of Reception Orders and Medical Certificates.—A medical

certificate (a) must be made and signed by a medical practitioner (s. 28, subs. (1)). "Medical practitioner" means a medical practitioner (1) duly registered under the Medical Act, 1858, 21 & 22 Vict. c. 90, and the Acts amending the same, and the Medical Act, 1886, 49 & 50 Vict. c. 48; and (2), *semble*, residing within the jurisdiction (s. 341); (b) where a reception order is founded on, must state the facts upon which the certifying medical practitioner has formed his opinion, distinguishing facts observed by himself from facts communicated by others (s. 28, subs. (2)); (c) if accompanying an urgency order, must contain a statement that it is expedient for the welfare of the alleged lunatic, or for the public safety, that he should be forthwith placed under care and treatment, with the reasons for such statements (s. 28, subs. (3)).

The medical practitioner who signs the medical certificate, or where two certificates are required, each medical practitioner who signs a certificate, must have personally examined the alleged lunatic in the case of an order upon petition not more than seven (and, see s. 29, subs. (3), in the case of an urgency order, not more than two) clear days before the date of the presentation of the petition, and in all other cases not more than seven clear days before the date of the order (s. 29, subs. (1)).

Where two medical certificates are required, each medical practitioner signing a certificate must examine the alleged lunatic separately from the other (s. 29, subs. (2)).

The petitioner or person signing the urgency order, the husband or wife (see 39 & 40 Vict. c. 41), father or father-in-law, mother or mother-in-law, son or son-in-law, daughter or daughter-in-law, brother or brother-in-law, sister or sister-in-law, partner or assistant of such petitioner or person, are disqualified for signing (s. 30). The usual medical attendant should if possible sign one certificate in the case of a private patient (s. 31).

Sec. 32 of the Act of 1890 disqualifies from signing certificates persons, and the relatives by blood or marriage, and the partners or assistants, of persons, who have a professional interest in the institutions or houses into which the patients concerned are to be received. It completes the re-enactment and extension (in conformity with the suggestion of the Commissioners in Lunacy in their 33rd Annual Report, p. 130) of sec. 12 of the Lunacy Act, 1853, and sec. 76 of the Lunatic Asylums Act, 1853. Commissioners and medical visitors are also disqualified (s. 33).

Sec. 34 subs. (1) provides for amendment of orders and certificates by the person signing the order or certificate. Subs. (2) provides for the initiative being taken by the Commissioners, but extends only to certificates. An amendment under this section when made and sanctioned relates back to the date of the order or certificate (subs. (3)).

No amendment can be made after fourteen days (which means all days, Sundays, etc., included) from the reception, and the power of the Commissioners to require amendments in certificates is subject (see subs. (2)) to the condition that the certificate must be duly amended within fourteen days after the reception.

A patient detained under an order or certificate, materially defective (as to what are material defects, see *Lowe v. Fox*, 1887, 12 App. Cas. 206), and not amended in the prescribed manner within fourteen days after the reception, will be discharged if the Commissioners think fit (subs. (2), and ss. 75 and 76), and is also entitled to bring an action for false imprisonment against the person receiving and detaining him.

A reception order is a sufficient justification (a) for the conveyance of the lunatic by the petitioner, or someone authorised by him, or in the case

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of an order not made on petition, by the person named in the order, to the place mentioned; (b) for his reception and detention there; and (c) for his recapture if he escapes (see s. 85). The order affords a good justification, although the person named in it is not in fact insane (*Norris v. Seed*, 1849, 3 Ex. Rep. 782, and *Mackintosh v. Smith*, 1865, 4 Macq. H. L. Cas. 913). The patient in such a case may obtain release by *habeas corpus* or by application to the Commissioners in Lunacy (s. 75).

Duration of Reception Orders.—A reception order expires at the end of one year from its date, unless extended by the Commissioners in the case of institutions for lunatics, or the patient is re-certified; (as to extension by Commissioners, see s. 38, subss. (2) and (4); as to re-certification, see Act of 1891, s. 7). The detention of a lunatic after expiry of a reception order is a misdemeanour (s. 38, subs. (7)).

Care and Treatment.

Private Patients.—A report as to the mental and bodily condition of the patient is to be sent to the Commissioners in Lunacy at the expiration of a month after reception (s. 39, subs. (1)). In the case of licensed houses, a copy of this report is laid before the visitors. Elaborate provision is made for visiting of the patients in both cases thereafter (s. 39); special visits may also be paid, and the Commissioners may make orders for discharge (*ibid.*).

Mechanical Restraint.—"Mechanical means of bodily restraint" (as to meaning of which, see Regulations of Commissioners in Lunacy, 1895) are not to be applied to any lunatic, unless the restraint is necessary for purposes of surgical or medical treatment, or to prevent the lunatic from injuring himself or others (s. 40, subs. (1)); and there are provisions for a medical certificate being granted after the use of restraint, describing the means and occasion of its exercise (*ibid.* subss. (2) and (3)), also for records of all cases of such exercise being kept (*ibid.* subss. (4) and (5)); as to the use of "the pack," see the case of *Thomas Weir*, Parl. Pap. 1895, c. 395.

Correspondence.—The manager of every institution for lunatics, and every person having charge of a single patient, is required to forward unopened all letters written by any patient and addressed to the Lord Chancellor or any Judge in Lunacy, or to a Secretary of State, or to the Commissioners, or any Commissioner, or to the person who signed the order for the reception of the patient, or on whose petition such order was made, or to the Chancery Visitors or any Chancery Visitor, or to any other visitors or visitor, or to the visiting committee, or any member of the visiting committee of the institution, in which any patient writing such letters may be, and may also at his discretion forward to its address any other letter if written by a private patient (s. 41, subs. (1)). A penalty of £20 (maximum) is prescribed for contravention of the provision as to correspondence (*ibid.* subs. (2)). Notices as to the rights of private patients to have letters forwarded, or interviews with Commissioners, are to be posted up in institutions for lunatics (see Order of Commissioners, 14th May 1890); a maximum penalty of £20 is prescribed for offences (*ibid.* subs. (4)).

A certifying practitioner may not be the regular medical attendant of a private patient (s. 43, subs. (1)). A Commissioner or visitor is also disqualified for professional attendance (subs. (2)).

Any one of the Commissioners in Lunacy, as to patients confined in an institution for lunatics or other place (not being a jail) authorised to be visited by the Commissioners, and any one of the visitors of a licensed house, as to patients confined in such house, may at any time give an order

in writing under his hand for the admission (either for a limited number of times or at all reasonable times) to any patient of any relation or friend, or of any medical or other person whom any relation or friend desires to be admitted to him (s. 47).

The words "other person" cover the case of persons who are not relations or friends, but who, for instance, are representatives of societies interesting themselves in preventing abuses of the lunacy law. But in such cases the Commissioners would probably refuse to make any order, on the ground that the applicants had no *locus standi*. The proper course for such persons to adopt is to apply to have the patient examined under sec. 49 *inf.* There is a maximum penalty of £20 for obstruction or refusal of admission by a manager, unless he has reasonable ground for such refusal.

Sec. 49 of the Lunacy Act, 1890, adopting the Scotch practice, provides that any person may, with the sanction of the Commissioners, on showing good cause for the step, send two medical men at any time to test the condition of any patient under restraint. The Act also provides for inquiries (a) by the Lord Chancellor, through the Masters in Lunacy; or (b) the Commissioners *ex proprio motu*, as to property of persons detained as patients (s. 50), and for searches as to whether a particular person has been confined (s. 51).

The employment of males in the personal custody of females, except on occasions of urgency, is prohibited under a maximum penalty of £20 (s. 53).

Any two visitors of an asylum, with the advice in writing of the medical officer (compare Rules of Commissioners in Lunacy, 1895, r. 19, (2)), may permit a patient in the asylum to be absent on trial so long as they think fit (s. 55 subs. (1)). The authority under which a patient was sent to an asylum does not need to be renewed during his absence on trial, although the ordinary time for its expiration arrives (see s. 37, subs. (2)); and if he does not return at the expiration of his leave, he may be retaken, as in the case of an escape (see s. 55, subs. (8)). An allowance may be made to a pauper lunatic during absence (s. 55, subs. (2)).

The manager of any hospital or licensed house may (a) send or take, under proper control, any private patient, or two or more private patients, to any specified place, or to travel in England, for such period as may be thought fit for the benefit of his or their health; (b) permit a private patient to be absent upon trial for such period as may be thought fit.

The previous consent is required of a Commissioner, or in the case of a hospital of two members of the managing committee, or in the case of a house licensed by justices of two of the visitors (s. 55, subs. (4)); and it is generally necessary to obtain and produce to the consenting authority (*ibid.* subs. (5)) the approval in writing of the person on whose petition the reception order was made, or by whom the last payment on account of the lunatic was made. Similar powers as to granting absence on leave are possessed by Commissioners as regards hospitals and licensed houses, and by two visitors in the case of houses licensed by justices (*ibid.* subs. (6)); also by persons in charge of single patients, with previous consent of Commissioners (s. 56).

Boarding-out Lunatics.—The visiting committee of an asylum may give over to the custody of a relative or friend any pauper lunatic confined in such asylum, if the guardians of the union to which the lunatic is chargeable or the local authority liable for his maintenance approve (s. 57, subs. (1)).

The authority liable for the maintenance of the lunatic is to pay to the

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person to whom the lunatic is delivered a reasonable allowance for maintenance, not exceeding the expenses which would be incurred on his account if he were in the asylum (s. 57, subs. (2)); and see s. 24, subs. (2) (f), of the Local Government Act, 1888).

Removal of Lunatics.—The Lunacy Acts provide for the removal (1) of private patients or single patients from an institution for lunatics or private charge by the person authorised to discharge the patient (s. 58 of Act of 1890), or by Commissioners; (2) of single patients, on death of person so having charge of the lunatic (s. 59 *ibid.* subs. (2)); (3) of lunatics in workhouses, by Commissioners, subject to a right of appeal by guardians to a Secretary of State (s. 60 *ibid.* subss. (1) and (2)); (4) of a pauper lunatic in a hospital or licensed house, by the authority liable for his maintenance (s. 61, subs. (1)), to the workhouse of the union to which the lunatic is chargeable, or if the lunatic is chargeable to a county or borough, to the workhouse of the union from which he was sent to the hospital or licensed house (Act of 1891, s. 11; (5) of a lunatic boarded out into an asylum, by the visiting committee (s. 63); (6) of a pauper into a county asylum, by two justices (s. 64); (7) of a pauper from an asylum into an institution for lunatics, by two visitors, subject to restrictions (as to which, see s. 67).

Removal orders are in duplicate, and are a sufficient authority to the person executing them (s. 70, subs. (2)).

An alien lunatic may be sent back to his own country, by Secretary of State's warrant, on the initiative of his friends (s. 71, subs. (1)).

A Secretary of State's warrant is a sufficient authority to the master of any vessel to receive and detain the lunatic on board and convey him to his destination (s. 71, subs. (2)).

Discharge of Lunatics.—A private patient detained in an institution for lunatics, or under care as a single patient, may be discharged if the person on whose petition the reception order was made, by writing under his hand so directs (s. 72, subs. (1)).

The discharge of a lunatic may be obtained by *habeas corpus ad subjiciendum*. The writ may be issued either during the sittings or in vacation, and be made returnable at Chambers in vacation. An affidavit in support of the application is necessary from the party who claims the writ, or else an affidavit from some other person to the effect that the party on whose behalf the writ is claimed is so coerced as to be unable to make an affidavit (*Canadian Prisoners' Case*, 1839, 3 St. Tri. N. S. 963), and that the party promoting the application was duly authorised by the lunatic (*Ex parte Child*, 1854, 15 C. B. 238). The Court has jurisdiction in virtue of sec. 5 of the Judicature Act, 1890, 53 & 54 Vict. c. 44, to grant costs against the unsuccessful party upon an application for a writ of *habeas corpus* (*R. v. Jones*, 1894, 29 L. Jo. 342). A person applying *bond fide*, or apparently *bond fide*, for a writ of *habeas corpus* ought to be shown the documents under which the detention is justified (*In re J. G. Dell*, 1891, 35 Sol. J. 783; *In re Carter*, 1893, 95 L. T. Jo. 37). See further as to *habeas corpus*, Short and Mellor's *Practice of the Crown Office*, p. 335, and Wood Renton on *Lunacy*, pp. 242 and 1082. Or, if that person is dead or incapable—and in the case of a pauper originally classified as a private patient—the person who made the last payment on account of the patient, or the husband or wife, or if there is no husband or wife, or the husband or wife is incapable as aforesaid, the father, or if there is no father, or he is incapable as aforesaid, the mother of the patient, or if there is no mother, or she is incapable, then any one of the nearest of kin of the patient (*ibid.* subs. (2)); or, in default, the Commissioners in Lunacy.

A pauper in a hospital or licensed house may be discharged by the authority liable for his maintenance (s. 73).

A patient is not to be discharged in the last two cases in the face of an adverse certificate of the medical officer or medical attendant, without the written consent of the Commissioners in Lunacy (s. 74).

The Acts also provide for the discharge by visitors of lunatics in a licensed house and of patients in asylums (ss. 77 and 78), for the discharge of paupers by relatives or friends (s. 79),—notice of discharge being given to the relieving officer of the union to which the lunatic is chargeable, or the clerk of the local authority liable for his maintenance (s. 80, subs. (1), a provision enacted in consequence of *Liverpool Overseers v. Lancaster Lunatic Asylum*, 1880, 5 Ex. D. 215,—and for the discharge from workhouses by the guardians (s. 81).

Any person who considers himself to have been unjustly detained as a lunatic is entitled, on his discharge, to obtain from the Secretary to the Lunacy Commissioners, free of expense, a copy of the documents on which he was confined (s. 82).

Patients are, of course, entitled to discharge on recovery (see s. 83).

Every coroner shall, upon receiving notice of the death of a lunatic within his district, if he considers that any reasonable suspicion attends the cause and circumstances of the death, summon a jury to inquire into the same (sec. 84).

A *post-mortem* examination may be ordered whether an inquest is held or not, and the Commissioners in Lunacy, in their 35th (p. 83) and 36th (p. 90) Annual Reports, have placed great emphasis on the importance of such examinations being held in all cases. As to fees of medical practitioners in connection with coroners' inquests or *post-mortem* examinations, see s. 22 of the Coroners Act, 1887.

Escape and Recapture.—If any person detained as a lunatic under the Act of 1890 escapes, he may, without a fresh order and certificate or certificates, be retaken at any time within fourteen days after his escape by the manager of the institution for lunatics, or the master of the workhouse in which he was detained, or any officer or servant thereof respectively, or by the person in whose charge he was as a single patient, or by anyone authorised in writing by such manager, master, or person (s. 85).

As to penalties on managers, etc., for permitting an escape, see s. 323. As to notices on escape and recapture, see rule 23 of the Rules of the Commissioners in Lunacy, 1895. As to escape from England to Scotland or Ireland, see s. 86; from Scotland into England or Ireland, s. 87; from Ireland into England or Scotland, ss. 88 and 89.

The retaking may be justified under an order and certificate in proper form, although the person named therein is not a lunatic (*Norris v. Seed*, 1849, 3 Ex. Rep. 782).

Visitation of Asylums.—Apart from the incidental visitation of asylums by Commissioners and visitors in consequence of the special reports as to mental and bodily condition already referred to, and the incidental visitation of lunatics, so found, by the order of the Masters in Lunacy (a subject which will be dealt with in the article on LUNACY), the English lunacy law provides a complete system for the regular periodical visitation of every kind of receptacle for the insane. The duties of visitation are divided between the Commissioners in Lunacy, the Chancery Visitors, and various other visitors and visiting committees, the respective powers and positions of whom must now be briefly described.

The Commissioners in Lunacy.—There are ten Commissioners—four

unpaid and six paid, of whom three are legal and three are medical, appointed and removable by the Lord Chancellor. A medical Commissioner must be a medical practitioner (s. 150, subs. (1))—no standing in point of time nor any requirement that he should be in actual practice is prescribed as a qualification. A legal Commissioner must be a practising barrister of not less than five years' standing (s. 151, subs. (2)). A paid Commissioner is not allowed to hold or carry on any other office or any profession or employment from which any profit is derived (s. 150, subs. (3)), and a Commissioner is disqualified if he is, or within one year prior to his appointment has been, interested in a licensed house (s. 158, subs. (1)), or becomes so (*ibid.* subs. (2)). Each of the paid Commissioners receives a salary of £1500 a year. The Commissioners in Lunacy have a secretary,—a barrister of not less than seven years' standing,—who is eligible for a legal Commissionership, and receives a salary of £800 a year—and an office of their own at 19 Whitehall Place, London, S.W.

The Chancery Visitors.—There are three Chancery Visitors—two medical and one legal, appointed and removable by the Lord Chancellor, and each receiving a salary of £1500 a year. The qualification of a medical visitor is that he should be a medical practitioner in actual practice, and of a legal that he should be a barrister of not less than five years' standing (s. 163). A Chancery Visitor is not to be engaged in the practice of his profession, and is disqualified by having been within two years preceding his appointment, or by becoming directly or indirectly, interested in a licensed house (s. 165). The Chancery Visitors and the Masters in Lunacy (as to whom, see article LUNACY) together form a Board, and have offices in the Royal Courts of Justice (s. 167). The Lord Chancellor has power under the Act of 1890 to amalgamate the three lunacy departments above described, or any two of them (s. 337).

Visiting Committees of Asylums.—Every asylum has a visiting committee of not less than seven members, appointed by the local authority (s. 169), usually at its quarterly meeting in November. Each visiting committee holds office till the election of their successors (s. 172), and members of visiting committees are not to be interested in contracts entered into, or work done for, the committees (s. 174, subs. (1)). These prohibitions do not, however, extend to the position of shareholder in a company (*ibid.* subs. (2)). The meetings of visiting committees of county councils are governed by sec. 82 of the Local Government Act, 1888. As to meetings of other visiting committees, see s. 175, subs. (2) of Act of 1890.

The staff of an asylum consists of a chaplain (in priest's orders), licensed by the bishop (who has power to revoke the licence) (see *R. v. Justices of Middlesex*, 1842, 2 Q. B. 445), a resident medical officer, a superintendent, a clerk, and a treasurer—all appointed by the visiting committee (s. 276). As to pensions and superannuation of officers, see ss. 280–282, and Poor Law Officers Superannuation Act, 1896. Lunatics of a religious persuasion other than that of the Church of England may be visited by a Nonconformist minister of their own persuasion (see ss. 277–280, subs. (3)).

Visitors of Licensed Houses.—The justices of every county and quarter sessions borough not within the immediate jurisdiction of the Commissioners (as to which, see s. 208, subs. (1)) annually appoint three or more justices, and also one medical practitioner, or more, to act as visitors of licensed houses within the county or borough (s. 177, subs. (1)).

A person is not qualified to be a visitor or clerk, or assistant clerk, to any visitor, who is or within one year prior to his appointment has been

interested in a licensed house (*ibid.* subs. (3)), and the acquisition of such an interest is a disqualification.

The annual appointment of visitors is made by justices of a county at their Michaelmas quarter sessions, and by justices of a borough at special sessions, to be held in the month of October; other appointments may be made by justices of a county at any quarter sessions, and by justices of a borough at special sessions, to be held at the same time as any quarter sessions (s. 177, subs. (7)).

A visitor cannot be appointed by the justices of a borough without the consent in writing of the recorder of the borough (s. 180).

The visitors meet at such times and places as they may think proper (s. 181, subs. (1)).

Duties of Chancery Visitors.—The Chancery Visitors visit lunatics so found by inquisition at such times and in such rotation and manner as the Rules in Lunacy, or as any special order of the Judge in Lunacy, direct (s. 183, subs. (1)).

Every lunatic is personally visited and seen by one of the Chancery Visitors twice at least in every year, and the visits are so regulated that the interval between successive visits in no case exceeds eight months (*ibid.* subs. (2)). Every lunatic resident in a private house is, during the two years next following inquisition, visited at least four times in every year.

The Chancery Visitors also visit persons alleged to be lunatics, on the direction of the Judge in Lunacy.

The Chancery Visitors, after each visit, make a report in writing of the state of mind and bodily health, and of the general condition, and also of the care and treatment, of each person visited, and these reports are submitted to the Lord Chancellor (s. 185, subs. (1)).

The Chancery Visitors may make separate or special reports (subs. (2)).

The reports of the Chancery Visitors are filed and kept secret in their office, are not open to the inspection of any person save the members of the board of visitors, and the Judge in Lunacy and such persons as he specially appoints (s. 186, subs. (1)).

And all the reports relating to any particular patient are destroyed on his death, or on the inquisition being superseded, or being vacated and discharged on a traverse, unless the Judge in Lunacy, within fourteen days after the supersedeas, or the vacating and discharge on a traverse, specially orders that they be not destroyed until the lunatic's death (subs. (2)). As to such reports, see *Roe v. Nix* [1893], Prob. 55.

Visitation of Lunatics in Asylums.

Two or more Commissioners, one medical and one legal, once at least in each year visit every asylum and make inquiries as to the condition of the patients, etc. (s. 187, subs. (1)).

Any one or more of the Commissioners may at any time visit any asylum with the like powers (s. 187, subs. (2)).

At least two members of the visiting committee together, once at least in every two months, inspect every part of the asylum, and see every patient therein, so as to give everyone, as far as possible, full opportunity of complaint (s. 188).

A single member of the committee has no power of visitation in the case of asylums. *Aliter*, as regards licensed houses within the jurisdiction of visitors appointed by justices, see s. 193, subs. (1).

Lunatics received under a contract are visited by two or more members of the visiting committee at least once in every six months (s. 189).

The visiting committee lay before each local authority to which the asylum belongs, at their quarterly meeting in November, or at such other time as the local authority appoint, a report in writing of the state and condition of the asylum, etc. (s. 190, subs. (1)), and a copy of this report is to be sent to the Commissioners in Lunacy by the clerk to the visiting committee within twenty-one days after it has been laid before the local authority (Rules of the Commissioners in Lunacy, 1895, r. 30).

Lunatics in Hospitals and Licensed Houses.—Every hospital and licensed house may at any time, by day or night, be visited by any one or more of the Commissioners (s. 191, subs. (1)).

Every licensed house within the immediate jurisdiction of the Commissioners (see s. 208, subs. (1)) is visited six times a year, namely: (a) four times by not less than two Commissioners, one medical and one legal; and (b) twice by one or more of the Commissioners (s. 191, subs. (2)).

Every licensed house not within the immediate jurisdiction of the Commissioners shall be visited twice a year by not less than two Commissioners, one medical and one legal (subs. (3)).

Every hospital is visited once a year by not less than two Commissioners, one medical and one legal (subs. (4)).

Every licensed house within the jurisdiction of visitors appointed by justices may at any time, by day or night, be visited by one or more of the visitors (s. 193, subs. (1)), and must be visited (a) four times a year by not less than two of the visitors, of whom one is to be a medical practitioner; and (b) twice a year by one or more of the visitors.

As to the chief heads of the Statutory Inquiry see Appendix Q. to the 32nd Report of the Commissioners in Lunacy, and p. 88 of that report.

The inquiries of all the visitors are to be facilitated by the asylum authorities, and penalties are prescribed for concealment (s. 195, subs. (1)) and obstruction (s. 321).

Visits to Single Patients.—Single patients in unlicensed houses are visited once at least in every year by one or more Commissioners (s. 198).

The county or borough visitors have power to visit single patients detained in unlicensed houses in the county or borough (s. 199, subs. (2)).

Visits to Paupers in certain Cases.—Paupers in institutions for lunatics may be visited by a medical practitioner appointed by the guardians of a union and also the guardians of any union, between eight in the morning and six in the evening (s. 201, subs. (1)).

Every pauper lunatic not in an institution for lunatics, once a quarter is visited, if not resident in a workhouse, by the medical officer of the union or district in which the lunatic is resident, and, if resident in a workhouse, by the medical officer of the workhouse (s. 202, subs. (1)).

A pauper lunatic is a lunatic (definition of, s. 341) who is in receipt of relief.

Any one or more of the Commissioners may at any time visit workhouses in which there is or is alleged to be any lunatic (s. 203).

The Local Government Board institutes from time to time inquiries with reference to lunatics in workhouses, in virtue of its general control over its officers.

Special Visits.—Special visits may also be ordered from time to time by the Commissioners, the Lord Chancellor, or the Home Secretary (s. 204).

Lunatics in Private Families and Charitable Establishments.—These cases may be visited by the Commissioners, who may report in regard to any of them to the Lord Chancellor, who may make an order for the discharge of any patient (s. 206).

The comprehensive scheme of asylum visitation which has thus been described works admirably in practice. Visitors of every grade have complete powers of inquiry, and the combination of periodical with unexpected visitation, which is the main characteristic of the modern English asylum system, prevents the occurrence of abuses in any appreciable number of cases.

Licensed Houses.—One of the problems of asylum administration which has long perplexed lunacy reformers, has been whether private houses licensed for the reception of insane persons should be continued. The objection to institutions of this kind derives its force to some extent from historical causes. It was in private madhouses that the worst abuses of the old asylum system flourished, and the impression that such abuses were inherent in the "private profit" principle has survived all the successful efforts of reformers to eradicate them from the English asylum system. The principle of "private profit" has, however, its disadvantages, although these are counterbalanced by the fact that the proprietor of a licensed house has a greater incentive to hasten the cure of his patients and see to their comfort than the paid officials of an asylum.

Under the Lunacy Act, 1890, the Commissioners in Lunacy exercise the licensing jurisdiction in the following places:—The cities of London and Westminster, the counties of London and Middlesex, and the following parishes and places—Barnes, Kew, Green, Mortlake, Merton, Mitcham, and Wimbledon, in the county of Surrey; Southend, in the county of Kent; and East Ham, Leyton, Leytonstone, Low Leyton, Plaistow, West Ham, and Walthamstow, in the county of Essex; and also every other place, if any, within the distance of seven miles from any part of the cities of London or Westminster, or of the borough of Southwark (s. 208, subs. (1), and third schedule).

In all places not within "the immediate jurisdiction" of the Commissioners, the licensing jurisdiction is exercised by the justices for every county and quarter sessions borough. The policy of the present lunacy law in regard to licensed houses has been—(1) While making provision for the protection of licensed houses in the course of being established at the passing of the Lunacy Act, 1889 (on which the Act of 1890 is based), and for the substitution of new for existing houses, to prohibit the grant of new licences (s. 208); and (2) to impose stringent conditions on the grant of licences in the limited class of cases which it preserved.

Conditions on which Licences are granted.

Before a licence is in any case granted for a house not within the immediate jurisdiction of the Commissioners, and not previously licensed, the Commissioners inspect and report upon its suitability (s. 210).

A licence is not granted unless the licensee, or one of the licensees, undertakes to reside in the house (s. 211). As to licences to joint-licensees, see sec. 112.

No addition or alteration is to be made to any unlicensed house or its appurtenances without the previous consent in writing of the Commissioners, and also of two of the visitors in the case of a house within the jurisdiction of visitors (s. 213). The wilful making of any untrue statement, etc., by an applicant for a licence to the Commissioners is a misdemeanour (s. 214).

Licences and renewed licences are stamped with a ten shilling stamp, and are under the seal of the Commissioners, or the hands of three or more of the licensing justices, as the case may be, in quarter or special sessions assembled, and are granted for a period not exceeding thirteen months.

In addition to the stamp, the sum of ten shillings for every patient not a pauper, and the sum of two shillings and sixpence for every pauper patient, are payable by licensees; and if the total amount of such sums of ten shillings and two shillings and sixpence does not amount to fifteen pounds, then so much more is to be paid as makes fifteen pounds (s. 217).

Where a licence is granted for less than thirteen months, the payment may be reduced to any sum not less than five pounds (sec. 217, subs. (3)).

The payment for a licence for a new house granted upon the transfer of patients from a licensed house is not less than one pound (exclusive of the stamp) (*ibid.* subs. (4)).

Notice on change of house is to be given to the person on whose petition the reception order of each private patient was made, or by whom the last payment on account of the patient was made, and to the authority liable for the maintenance of each pauper patient (s. 219).

The penalty for infringing a licence is fifty pounds for each patient (s. 220).

The Lord Chancellor may revoke, or prohibit the renewal of, a licence on the recommendation of the licensing Commissioners or justices (s. 211). The detention of patients after the expiration or revocation of a licence is a misdemeanour (s. 222).

Moneys received for licences by clerks of the peace are paid into the county or borough fund, as the case may be (s. 224). And as to audits of accounts, see *ibid.* subs. (3), s. 225; and also sec. 66 of the Local Government Act, 1888.

In every house licensed for one hundred patients, or more, there is resident as the manager and medical officer thereof a medical practitioner (s. 228, subs. (1)).

Every house licensed (a) for less than one hundred, and more than fifty, patients (in case the house is not kept by, or has not, a resident medical practitioner) is visited daily by a medical practitioner (*ibid.* subs. (2)); (b) for less than fifty patients (in case the house is not kept by, or has not, a resident medical practitioner) is visited twice a week by a medical practitioner (*ibid.* subs. (3)); (c) for less than eleven lunatics may, by the written authority of the Commissioners, be visited at greater intervals, not more, however, than once in every two weeks.

As to the reception of boarders into licensed houses, see secs. 229 and 230 of Act of 1890, and sec. 20 of Act of 1891.

There were, on 1st January 1896, 75 licensed houses, of which 25 were metropolitan, and 50 provincial. These numbers indicate a material reduction in the last ten years—in January 1886 the total number being 96; 34 metropolitan, and 62 provincial. The total number of patients for whom all the houses were licensed was, on 1st January 1896, 5038 (50th Report of Commissioners in Lunacy, p. 51).

Registered Hospitals.—When the agitation against the system of licensed houses was at its height, it was suggested by a select committee of the House of Commons, appointed in 1877 to inquire into the working of the lunacy law, that a mean might be adopted between the two extreme views. They considered that no alteration in the law was necessary, but that the matter had better be left to the spontaneous action of the public; and that when there was sufficient accommodation for all classes in public institutions, such as existed in Scotland, in Cornwall, and at Cheadle in Cheshire, it was possible that there would be no demand for licensed houses for the upper and middle classes. In this opinion the committee concurred, and

suggested that legislative facilities should be afforded by enlargement of the powers of magistrates or otherwise for the extension of this system.

The provisions of sec. 207, summarised above, and of sec. 231, are intended to carry out this recommendation. The former section at once protects vested interests, and makes provision for licensed houses in the course of being established at the passing of the Act of 1889, and for the substitution of new for existing houses, and prohibits the grant of new licences. The latter deals with the registration of hospitals. "Hospital" is defined as any hospital or part of a hospital or other house or institution (not being an asylum) wherein lunatics are received and supported wholly or partly by voluntary contributions, or by any charitable bequest or gift, or by applying the excess of payments of some patients for or towards the support, provision, or benefit of other patients.

Every hospital is to have a resident medical practitioner as its superintendent and medical officer (s. 230).

When application is made for the registration of a hospital for the reception of lunatics, the Commissioners depute any one or more members of their body to inspect it, and report to them (s. 231, subs. (1)).

If the Commissioners are of opinion that the hospital ought not to be registered, they shall report to the Home Secretary, who finally determines the point (*ibid.* subs. (2)). If they are of opinion, or the Home Secretary determines, that the hospital ought to be registered, the Commissioners issue a provisional certificate of registration (*ibid.* subs. (3)), valid generally for six months from its date (*ibid.* subs. (4)).

Within three months from the date of the provisional certificate, the managing committee of the hospital frame regulations, and submit them to the Home Secretary (*ibid.* (5)). And see sec. 12 of Lunacy Act, 1891, as to power of managing committee to alter regulations.

Upon approval of the regulations by the Home Secretary, the Commissioners issue a complete certificate of registration, specifying the total number of patients of each sex who may be received (*ibid.* subs. (6)); and the total number of patients and boarders, if any, may at no one time exceed that number (subs. (8)).

A superintendent who receives a patient contrary to these provisions is guilty of a misdemeanour (*ibid.* subs. (10)).

There is a provision in the Lunacy Act, 1891 (s. 21), for the protection of persons resident in the neighbourhood of registered hospitals against inconvenience from patients being allowed to go outside without a sufficient number of officers to control them.

As to superannuation allowances, see sec. 235 of Act of 1890.

No medical or other officer of a hospital, and no person interested or participating (otherwise than as a shareholder of a company) in the profits of any contract with, or work done for, the managing committee of a hospital, is qualified to be a member of that committee (s. 236).

The accounts of every registered hospital which does not submit its accounts to the Charity Commissioners are audited once a year by an accountant or auditor approved by the Lunacy Commissioners (s. 234, subs. (1)).

The registered hospital system has not been a great success. The number of such hospitals is at present stationary at about fourteen (see 50th Report of Commissioners in Lunacy, p. 33).

County and Borough Asylums.—Obligation to provide Asylums.

Every "local authority," a term which means, in this connection, the council of every administrative county and county borough respectively

constituted under the Local Government Act, 1888 (s. 240 of Act of 1890), and the council of each of the following boroughs:—Barnstaple, Bedford, Berwick-on-Tweed, Bridgewater, Bury St. Edmunds, Cambridge, Colchester, Doncaster, Grantham, Gravesend, Guildford, Hereford, King's Lynn, London (City of), Newark, Newbury, Newcastle-under-Lyme, New Sarum, New Windsor, Penzance, Poole, Rochester, Scarborough, Shrewsbury, Tiverton, Warwick, Wenlock, Winchester, or, in the case of the City of London, the common council (sched. iv., Act of 1890), is under an obligation to provide and maintain asylums (s. 238).

Modes in which this Obligation may be Discharged.

(1) A local authority may discharge this obligation in all or any of the following ways:—by (a) providing and maintaining an asylum alone; (b) agreeing to unite with any other local authority or local authorities in providing and maintaining a district asylum, or for the joint use as a district asylum of any existing asylum (s. 242, subs. (1)).

An agreement to unite needs the approval of the Home Secretary. There are further provisions for contracts between the councils of county boroughs and visiting committees for the reception of pauper lunatics (s. 243, subs. (1)). Such contracts also need the approval of the Home Secretary (*ibid.* subs. (4)).

Where a county borough has contributed to the cost of building and furnishing a county asylum, the existing liability of the borough council shall continue until a new arrangement is made (s. 244, subs. (1)) (as to the terms and effect of such arrangements, see s. 244, subs. (2)), and there is power under s. 14 of the Lunacy Act, 1891, to refer questions arising, to arbitration or to the Court. If the former alternative is adopted the provisions of s. 62, subs. (5), (6), and (7), of the Local Government Act, 1888, apply (s. 15 of Act of 1891). Where a borough contracts with a county, the powers of the borough to provide an asylum close on the determination of the contract (s. 246). Boroughs annexed to counties contribute to the expense of providing asylums (s. 13, subs. (1), Act of 1891). This last provision embodies the law in relation to the maintenance of borough lunatics (*In re Howlett v. Mayor etc. of Maidstone* [1891], 2 Q. B. 110). The boroughs in question are deprived of their power to create asylums, and, instead, are bound to send their lunatics to the county asylums, and to contribute sums fixed by agreement or arbitration, under s. 62 of the Local Government Act, 1888.

The Home Secretary has power to enforce the obligations resting on local authorities in regard to asylum accommodation (s. 247).

Agreements to unite.—Agreements to unite are required to state—(a) the number of visitors to be chosen by each contracting party; (b) the proportion in which the expenses are to be borne and the basis upon which such proportion is fixed (as to this see also s. 249); (c) in case of joint user of an existing asylum, the sum to be paid towards expenses already incurred (s. 248, subs. (1)).

The statutory form of agreement to unite will be found in Form 21, sched. ii., Act of 1890.

An agreement to unite is reported and delivered to the clerk of the local authority within whose administrative area the asylum to which it relates is, or is to be, situated (s. 251), and a visiting committee is then elected (s. 253). A visiting committee empowered to provide asylum accommodation has wide incidental powers with regard to the purchase of lands (the Lands Clauses Acts are incorporated, except the provisions as to

the purchase of lands otherwise than by agreement, the sale of superfluous lands, the recovery of forfeitures, etc., according to the special Act, s. 260) and buildings (s. 254, subs. (1)), subject to the check of the necessary approval of a Secretary of State (*ibid.* subs. (2)). Among the powers above referred to are additions to asylums for private patients (s. 255), enlargement of district asylums (s. 257), the provision of burial grounds (s. 258); as to the burial of lunatics see s. 259, and consult the following cases:—*R. v. Stewart*, 1840, 12 Ad. & E. 773; *R. v. Price*, 1884, 12 Q. B. D. 253; *Andrewes v. Cawthorne*, 1744–45, Willes, 536; *Dean of Exeter's case*, 5 Anne, 1 Salk, 334.

Rating of Asylums.—Lands and buildings purchased or acquired for the purposes of any asylum, and buildings erected on them, are, while used for those purposes, assessed to county, parochial, district, and other rates on the same basis and to the same extent as other lands and buildings in the same parish, township, or district.

The local authority will therefore be considered as a hypothetical yearly tenant, and any profits which it may make by the admission of pauper lunatics from other counties or boroughs (ss. 243 and 269), or of private patients (ss. 241 and 271), or by the sale of produce of land cultivated by the patients as part of the curative regimen of the asylum, will be taken into account in the assessment.

In a county or borough lunatic asylum such parts of the premises as are occupied by the medical superintendent, medical officers, steward, chaplain, and other officers of the asylum whose income exceeds £150 a year, come within the scope of the Income Tax Acts. Such premises are not entitled to the benefit of the exemption in favour of Crown property solely used for Crown purposes (*Bray v. Justices of Lancashire*, 1889, 22 Q. B. D. 484). See now exemptions from assessment to income-tax under secs. 34 and 35 of the Finance Act 1894, 57 & 58 Vict. c. 30. See further as to rating of asylums to (a) inhabited house duty (*Cawse v. Nottingham Lunatic Asylum* [1891], 1 Q. B. 585; *Needham v. Bowers*, 1888, 21 Q. B. D. 436); (b) income tax (*St. Andrew's Hospital, Northampton v. Shearsmith*, 1887, 19 Q. B. D. 624).

As to the powers of visiting committees in regard to repairs, alterations, and improvements, see sec. 266 of Act of 1890.

Dissolution of Agreement to unite.—A visiting committee, with the consent of the Home Secretary, may, by a resolution passed by a majority of the whole number of members, dissolve an agreement to unite (s. 267, subs. (1)). Before the dissolution takes effect a committee must be elected, by each local authority concerned (subs. (2)), to fulfil the statutory obligations as to asylum accommodation.

Upon the dissolution of an agreement to unite, the visiting committee may divide the real and personal property held for the purposes of the agreement among the several local authorities, in the proportion of their respective contributions (*ibid.* subs. (4)).

The Lunacy Acts also contain provisions for the cancellation of contracts (s. 268), and for the admission of pauper lunatics from other counties or boroughs under reception contracts (see sec. 269 of Act of 1890, and also sec. 17 of Act of 1891).

Admission of Private Patients.—Private patients may be received into any asylum upon such terms as to payment and accommodation as the visiting committee think fit (s. 271, subs. (1)).

As to financial arrangements, see subs. (2) *ibid.*

Borrowing Powers.—For the purposes of its powers, the local authority may, with the consent of the Local Government Board, and subject to the

provisions of the Local Government Act, 1888, and the Municipal Corporations Act, 1882, borrow on the security of the county or borough fund, and of any revenue of the local authority, or on either such fund or revenues or on any part of the revenues, such money as the local authority require (s. 274, subs. (1)).

Expenses of Pauper Lunatics—Weekly Expenses.

Every visiting committee is required to fix a weekly sum, not exceeding fourteen shillings, sufficient to defray the expenses of maintenance and other expenses of each pauper lunatic in the asylum (s. 283, subs. (1)).

An extra sum, if needed, may be fixed by the local authority (*ibid.* subs. 2)).

Where there is more than one asylum under the control of a visiting committee a uniform charge is to be made in the several asylums (s. 284). As to whom an overplus of profits belonged to, see *Proctor v. Cheshire County Council*, 1892, 56 J. P. 532.

Medical Fees and other Expenses.—Whenever a lunatic or alleged lunatic, whether a pauper or not, is examined by a medical practitioner, the justice directing the examination, or any other justice having jurisdiction in the place where the examination took place, may make an order upon the guardians of the union named in the order for payment of reasonable remuneration to the medical practitioner, and of all other reasonable expenses in and about the examination and the inquiry.

The guardians may recover any sums paid under the order against the lunatic or alleged lunatic and his estate, and the person liable for his maintenance (s. 285), in the case of orders for maintenance under this Act.

Liability for Expenses of Maintenance.—Expenses of maintenance are the reasonable charges of lodging, maintenance, clothing, and care (s. 287, subs. (1)). The law is as follows: Where a pauper lunatic is sent to an institution for lunatics, or a lunatic in such a union becomes a pauper (see s. 22 of the Act of 1891, and *Ipswich Union v. Macclesfield Union*, 1891, 55 J. P. 134), he is chargeable to the union from which he was sent till the settlement has been adjudicated, or cannot be ascertained, and the manager of the institution gives notice of his destitution to the authority liable for his maintenance (s. 286, subs. (1)). *Seem*, the liability of the union for the maintenance dates from the time that such notice is given.

The justice by whom any pauper lunatic is sent to any institution for lunatics, or any two justices of the county or borough in which the institution for lunatics where any pauper lunatic is confined is situate, or from any part of which any pauper lunatic has been sent, or any two justices, being visitors of such institution, may make an order, retrospective or prospective, or partly the one and partly the other, upon the guardians of the union to which the lunatic is chargeable, for payment to the treasurer, or manager of the institution, of the expenses of maintenance of such lunatic (s. 287). There is no appeal against any such order (*ibid.* subs. (3)).

The guardians are not, however, left without redress. They may relieve themselves from liability, under secs. 288 and 289, by showing that the lunatic has a legal settlement, which two justices have power to inquire into and adjudge, and in adjudging which they would make an order for payment of all expenses incurred, and for the maintenance of the lunatic, upon the guardians of the union or settlement; or, under s. 290, if it cannot be ascertained where the lunatic is settled, by applying for and obtaining an order of two justices upon the treasurer of the local authority

within whose area the lunatic was found, for those expenses and his maintenance (see *per* Cockburn, C. J., in *R. v. Recorder of Northampton*, 1865, 6 B. & S. 660-1).

All incidental expenses and expenses of maintenance of a lunatic removed to an institution for lunatics, who would at the time of his removal have been exempt from removal to the parish of his settlement or the country of his birth, under the Poor Removal Act, 1846, as amended by subsequent Acts, are to be paid by the guardians of the union in which the lunatic has acquired such exemption (s. 294).

For the general conditions of irremovability, see article POOR LAW. There are, however, some special points with reference to the effect of detention in an asylum on the settlement of pauper lunatics which must be noted here.

The mere bodily removal of a lunatic, while unable to exercise any will of his own, is no break of residence (see *R. v. Whitby*, 1870, L. R. 5 Q. B. 325). The removal of a pauper lunatic to a lunatic asylum under the provisions of any Act relating to the maintenance and care of pauper lunatics is not deemed a removal within the meaning of the Poor Removal Act, 1846.

The period of a wife's confinement in an asylum at the cost of the guardians must be excluded in computing the time of the husband's residence (*R. v. St. George's, Bloomsbury*, 1863, 32 L. J. M. C. 217). Periods, however, in such a case, during which the wife, enjoying lucid intervals, resided with her husband, who received at those times no relief, may be put together, so as to constitute the period of residence necessary to confer upon him the status of irremovability (see *Ipswich v. West Ham*, 1887, 20 Q. B. D. 407).

The removal of any lunatic pauper to an asylum, licensed house, or registered hospital, under the authority of the statutes in that behalf, or of any pauper, otherwise than under an order of removal, from his place of abode in any parish of a union to the workhouse of such union, shall not be deemed an interruption of the residence of such pauper within the meaning of the Poor Removal Act, 1846; but the time spent in such lunatic asylum, licensed house, or registered hospital, or workhouse respectively, and the time during which any person shall be relieved at the charge of the common fund of the union, shall be wholly excluded from the computation of the time of residence which, according to the provisions of such statute, will exempt a poor person from being removed (Poor Law Amendment Act, 1849, 12 & 13 Vict. c. 103, s. 4).

Charges may be paid without the orders of justices (s. 295), and the liability of the relations of pauper lunatics is not affected by the provisions, above summarised, as to their maintenance (s. 296).

As to expenses of the removal, discharge, and burial of pauper lunatics, see s. 297.

Appeals.—Any person aggrieved (see AGGRIEVED) by the refusal of an order by any justice or justices as to expenses of maintenance, etc., of this Act, may appeal to a court of quarter sessions (s. 301, subs. (1)). The determination of the Court is final (*ibid.* subs. (2)).

The guardians of any union may appeal against any order adjudging the settlement of a lunatic, to the quarter sessions for the county or borough on behalf of which the order has been obtained, or in which the union obtaining the order is situate, or, in case such union extends into several counties, then to the next quarter sessions for the county or borough in which the institution for lunatics where the lunatic is or has been confined

is situated. Such sessions have full power finally to determine the matter (s. 303).

The grounds of appeal are to be stated (s. 306). Formal objections are to be disallowed, or may be removed by amendment (ss. 307-8), and the decision of the Court is final (s. 310).

The provisions of sec. 31 of the Summary Jurisdiction Act, 1879, which do not apply to the appeals under consideration, deal with procedure on appeals from courts of summary jurisdiction to courts of general or quarter sessions.

As to the recovery of expenses, see sec. 314.

Offences connected with Asylum Administration.—(1) To receive or detain a lunatic, or alleged lunatic, contrary to the Act is a misdemeanour, and, in the case of detention in an unlicensed house, a penalty not exceeding fifty pounds may also be imposed (s. 315, subs. (1)). As to meaning of "lunatic" for this purpose, see *R. v. Bishop*, 1880, 5 Q. B. D. 259.

(2) To receive or detain two or more lunatics in any house, unless the house is an institution for lunatics, or workhouse, contrary to Act (s. 315, subs. (2)): misdemeanour (*ibid.* subs. (3)):

(3) Neglect to send notices on admission: misdemeanour, and in case of a single patient, penalty of fifty pounds may also be imposed (s. 316):

(4) To make wilful misstatement of material fact in any petition, statement of particulars, reception order, medical or other certificate, or statement or report of bodily and mental condition: misdemeanour (s. 317). No prosecution is allowed for this misdemeanour without the order of the Commissioners, or the direction of the Attorney-General or the Director of Public Prosecutions:

(5) To knowingly make any false entry in any book, statement, or return, as to any matter as to which an entry is required: misdemeanour (s. 318):

(6) Omission to send notice to coroner of death of single patient: misdemeanour (s. 319):

(7) Non-compliance with the Act or rules: penalty not exceeding ten pounds for each day or part of a day during which the default continues, unless a penalty is expressly imposed by the Act of 1890, or any other Act, for such default. All or any part of the cumulative penalties may be remitted by the Court in any proper case (s. 320):

(8) To obstruct any Commissioner or Chancery or other visitor in the exercise of his powers: penalty not exceeding fifty pounds for each offence, and misdemeanour (s. 321):

(9) Ill treatment of any patient by any person in charge: misdemeanour, fine or (and) imprisonment; or penalty, not less than two nor more than twenty pounds for each offence (s. 322). As to the kind of custody which comes within the range of this provision, see *Buchanan v. Hardy*, 1887, 18 Q. B. D. 486. The evidence of patients is frequently taken in proceedings for ill treatment. As to the conditions under which such evidence is admissible, see Wood Renton on *Lunacy*, pp. 682-684:

(10) Permission by any manager, etc., of escape of patient, or secretion of patient by any such manager: penalty between two pounds and twenty pounds (s. 323):

(11) Abuse of any female lunatic by any person employed in any institution for lunatics: misdemeanour; two years' imprisonment (maximum) with or without hard labour; consent immaterial (s. 324). As to common law on this subject, see *R. v. Fletcher*, 1859, Bell's C. C. 63; *R. v. Fletcher*, 1886, L. R. 1 C. C. R. 39; *R. v. Barratt*, 1874, 43 L. J. M. C. 7.

The Lunacy Act, 1890, contains various provisions for the protection of persons prosecuted or sued for things done or omitted to be done in pursuance of the statute. Thus where the charge is omission to send documents, the burden of proof as to sending rests on the person prosecuted; but if he proves by the testimony of one witness upon oath that the document was properly addressed and put into the post in due time, or left at the proper office, such proof is a bar to all further proceedings in respect of such charge.

Again, persons putting the law in force are not to be liable to any civil or criminal proceedings, whether on the ground of want of jurisdiction or on any other ground, if they have acted in good faith and with reasonable care (s. 330, subs. (1)); and civil proceedings may be stayed on summary application to the High Court or a judge, if the Court or judge is satisfied that there is no reason for alleging want of good faith or reasonable care (*ibid.* subs. (2)). As to this latter provision, see *Williams v. Beaumont & Duke*, 1894, 10 T. L. R. 489, 543. And see now, as to the protection of persons acting in execution of a statutory or other public duty, Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61, s. 1.

Criminal Lunatic Asylums.—There was no doubt at common law as to the power of the Courts to order the detention of criminal lunatics in safe custody. But prior to 1800 the practice was varying and uncertain. In that year, however, after the acquittal of Hadfield for the attempted murder of George III. in Drury Lane Theatre (see article LUNACY), a question arose as to the provision which should be made for his detention, and the Criminal Lunatics Act, 1800, 39 & 40 Geo. III. c. 94, part of which is still in force, was passed to affirm the law on the subject. The Act of 1800 provided that in cases of high treason, murder, or felony, persons acquitted on the ground of insanity (s. 1), or found insane upon arraignment (s. 2), may be ordered by the Court to be kept in strict custody till Her Majesty's pleasure was known, and such persons were therefore called Queen's pleasure lunatics. By sec. 4, insane persons by whom the Sovereign's person is endangered may be kept in safe custody by order of the Privy Council or Secretary of State pending further inquiry. The right of detention of such persons rests in the Lord Chancellor, Lord Keeper, or Lords Commissioners for the Custody of the Great Seal.

No provision of a permanent character was, however, made till 1860. There were criminal lunatic wards at Bethlem Hospital, and arrangements were made by the Government for the reception of criminal lunatics at Fisherton House. But nothing further was done till the establishment of Broadmoor Asylum in 1860, in pursuance of the Criminal Lunatic Asylums Act, 1860, 23 & 24 Vict. c. 75. That statute enables Her Majesty by warrant to appoint any asylum or place in England, that may be deemed suitable, to be an asylum for criminal lunatics (s. 1), and empowers the Home Secretary to appoint a council of supervision, as well as officers, attendants, and servants for any asylum provided under the Act, and to make rules for the government of such asylums (secs. 4 and 5). As yet Broadmoor only has been appointed under this authority, and hence the statute of 1860 is known as the Broadmoor Act.

The Criminal Lunatics Act, 1838, 1 & 2 Vict. c. 14, enables justices to order the apprehension and conveyance to an asylum, and to inquire into the settlement of lunatics or dangerous idiots, and to make outlay for their maintenance. The authority on which the maintenance order is made has a right of appeal to quarter sessions. As to conditions of such appeals, see APPEALS TO QUARTER SESSIONS. In order to justify apprehension, the

circumstances must be such as to denote both a derangement of the mind and a purpose of committing some indictable offence.

The Lunatics Removal (India) Act, 1851, provides for the removal to a criminal lunatic asylum in this country of persons found guilty of crimes and offences in India, and acquitted on the ground of insanity. See *In re Maltby*, 1881, 7 Q. B. D. 18, as to the construction of the statute.

Similar provisions with regard to colonial criminal lunatics are contained in the Colonial Prisoners Removal Act, 1884, 47 & 48 Vict. c. 3. The object of the Act is to authorise the removal from any British possession (including India) to the United Kingdom or to any other consenting British possession, for the purpose of undergoing the remainder of their sentences, of prisoners who have been tried under the authority of Imperial Acts, or who at the time of committing the offences of which they are convicted are subject to the Army Act or the Navy Discipline Acts, and prisoners not coming under either of the foregoing categories whose health would be permanently injured by imprisonment in the possession where they are undergoing sentence, or whom it is expedient to remove for safer custody or for more efficiently carrying out the sentence. The Act also authorises the removal of criminal lunatics from any possession to the United Kingdom or to another possession.

Although it is unlikely that the occasions for the exercise of the powers proposed to be created by the Act will frequently arise, cases have occurred from time to time in which the existence of such powers would have prevented great hardships and even cruelty to Europeans sentenced to long terms of imprisonment in tropical climates.

The policy of this statute has been followed in the New South Wales Lunacy Convention Act, 1894, 58 Vict. (No. 5), and in the Falkland Islands Lunacy Ordinance, 1895 (No. 2), which enables the Governor in Council to send lunatics in gaols in the colony to the United Kingdom. There appears to be no lunatic asylum in the colony. See *Journal of the Society of Comparative Legislation*, 1896, vol. i. pp. 25 and 102.

For the law with reference to the arraignment and trial of persons alleged to be lunatics who are charged with criminal offences, see LUNACY.

Where it appears to any two members of the visiting committee of a prison that a prisoner, *not being under sentence of death*, is insane, they have him examined by two legally qualified medical practitioners, Criminal Lunatics Act, 1884 (s. 2, subs. (3)). If the certificate is to the effect that the prisoner is insane, the Home Secretary may by warrant direct his removal to a criminal lunatic asylum (s. 2, subs. (1)).

A similar inquiry may be instituted by the Home Secretary in the case of a *prisoner under sentence of death*, with similar procedure in the event of insanity being certified (*ibid.* subs. (4)).

Where it is certified by two medical practitioners that a criminal lunatic (not being a person with respect to whom a special verdict has been returned that he was guilty of the act or omission charged against him, but was insane at the time (see LUNACY)) is sane, the Home Secretary may direct him to be remitted to prison (s. 3).

The Criminal Lunatics Act, 1884, contains provisions similar to those contained in the Lunacy Act, 1890, as to the discharge (conditional or absolute) and transfer of criminal lunatics, and the detention of persons becoming pauper lunatics.

The expenses of maintenance of criminal lunatics are defrayed out of moneys provided by Parliament. Hansard, 3rd ser., vol. ccxc. p. 75; 139 Com. Jo. 336, 340, 344; and s. 10 of Act of 1884.

In the case of criminal lunatics absolutely or conditionally discharged (see s. 5, subs. (2)), only such sum or sums as the Commissioners of the Treasury on the recommendation of the Secretary of State think fit, are contributed (subs. 2). There is power to recover charges from the lunatic's estate (subs. (3)).

Criminal lunatics removed under the Lunatics Removal (India) Act, 1851, are also an exception (subs. (4)).

"Criminal lunatics" means for the purposes of the Act—(a) any person for whose safe custody during Her Majesty's pleasure Her Majesty or the Admiralty is authorised to give order; and (b) any prisoner whom a Secretary of State or the Admiralty has in pursuance of any Act of Parliament directed to be removed to an asylum or other place for the reception of insane persons (s. 16).

[See on the whole subject of this article, Pope on *Lunacy*; Archbold's *Lunacy*; Wood Renton on *Lunacy*.]

Asylums Boards.—1. *Metropolitan.*—The Metropolitan Asylum Board is the board of management of the metropolitan asylum district constituted in 1867, by order of the Poor Law Board, under the powers of the Metropolitan Poor Act, 1867, 30 & 31 Vict. c. 6.

Sec. 5 of that Act provided for the institution, support, and management of asylums for the reception and relief of the sick, insane, or infirm, or other class or classes of the poor, chargeable in unions and parishes in the metropolis. By the above-mentioned order the unions and parishes enumerated in the schedule annexed thereto, being all wholly, or for the greater part thereof, included within the metropolis as defined by the Metropolitan Management Act, 1855, 18 & 19 Vict. c. 120, were combined into a district, now co-extensive with the administrative county of London, to be termed "The Metropolitan Asylum District," for the reception and relief of the classes of poor persons chargeable to some union or parish in the said district respectively, who may be "infected with or suffering from fever, or the disease of small-pox, or may be insane."

A board of management was constituted for the district, of forty-five members, to be elected for each union and parish according to the number set against its name in an appended schedule, and of fifteen members to be nominated by the Poor Law Board.

The guardians of each union or parish were to elect the managers from amongst themselves, or ratepayers rated to the poor-rates within the district upon a net annual value of not less than £40, and their term of office was to be for three years.

By various orders of the Poor Law Board, the parishes have been redistributed amongst the unions, and certain parishes formed into unions, and the number of representatives altered, so that in 1886 the board was formed by fifty-four elected members and eighteen nominated. The nominated members are never to exceed one-third of the elected members. The insane persons admitted into an asylum under the board, are such harmless persons of the chronic or incurable class as could be lawfully retained in a workhouse; but no dangerous or curable persons, such as would require to be sent to a lunatic asylum, ought to be admitted.

Sec. 11 of the Metropolitan Poor Amendment Act, 1869, 32 & 33 Vict. c. 63, to amend the above-mentioned Act, enacted that the guardians of any union or parish, the managers of any school "or asylum district,"

might, with the consent of the Poor Law Board, purchase, hire, or otherwise acquire, and fit up and furnish one or more ships, to be used for the training of boys for the sea-service; and every such ship is deemed a school or asylum.

Under these powers, asylums have been set up in various parts of the district for small-pox, fever, and cases of imbecility; as well as training-ships under the directions of the Poor Law Board, or the Local Government Board, which from 1871 has exercised its powers and duties.

The Asylum Board is a corporation with a common seal, with power to take and hold lands, and other property, for the purposes of the Act, and has the general powers of poor-law guardians as regards the asylums, with the like powers of borrowing money for building and necessary purposes connected with their management. The managers are subject to the orders of the Local Government Board in like manner as guardians under the Poor Law Acts. In an asylum for the insane, the Commissioners in Lunacy may depute either one of their own number, or a special Commissioner, to attend meetings, but not to vote. Every asylum is a workhouse within the meaning of the Lunacy Acts. The expenses are defrayed by contributions from the unions and parishes forming the district.

By sec. 16 of the Valuation (Metropolis) Act, 1869, 32 & 33 Vict. c. 67, a duplicate of the certified valuation lists, made by the various assessment committees (see ASSESSMENT COMMITTEE), is directed to be sent to the clerk of the managers of the board. He had the duty of printing and distributing the totals of the gross and rateable value in the lists to every assessment committee, and the overseers of every parish in the metropolis, and many other authorities. These duties were transferred to the clerk of the London County Council by the Local Government Act, 1888, s. 44.

In an action for nuisance against the managers, by landowners adjacent to one of their small-pox hospitals, it was held that the powers conferred by the Act do not authorise the managers to create a nuisance to health or property, there being no direct and peremptory provision to exercise their powers within defined local limits (*Managers of the Metropolitan Asylum District v. Hill*, 1881, 6 App. Cas. 193).

2. *Lancashire Asylums Board*.—An Asylums Board for the County of Lancashire was constituted by the Lancashire County (Lunatic Asylums and other Powers) Act, 1891, 54 Vict. c. xx.), and to its administration were transferred the following four pauper lunatic asylums, namely, the Lancaster Asylum at Lancaster, the Whittingham Asylum near Preston, the Rainhill Asylum near Liverpool, and the Prestwich Asylum near Manchester. The board is constituted of thirty-eight representatives of the county, and of forty-nine representatives of the county boroughs (s. 3).

It is a body corporate, by the name of the Lancashire Asylums Board, with perpetual succession and a common seal, and with power to hold land for the purposes of its constitution without any licence in mortmain, and to dispose of land.

The members are annually elected in November, 38 by the County Council (s. 5, subs. (1)), and the rest by county boroughs (*ibid.* subs. (2)) in the following proportions:—Barrow-in-Furness, 2; Bootle, 2; Bolton, 4; Burnley, 2; Bury, 2; Liverpool, 8; Manchester, 6; Oldham, 4; Preston, 4; Rochdale, 2; Salford, 4; St. Helen's, 2; Stockport, 1; Wigan, 2. Blackburn had formerly four allotted to it, but has withdrawn from the arrangement, in terms of an enabling provision in the Act (s. 37).

Members of the board come into office on their election, and hold office until the next ensuing election, and are re-eligible (s. 5. subs. (4)).

A member of the board is not to be interested, otherwise than as a shareholder in a company, either in his own name or in the name of any other person, in any contract entered into or work done for the board, and is not to derive any profit or emolument whatsoever from the funds of the county lunatic asylums (s. 6).

A member of the board elected by the county council who ceases to be a member of the county council ceases to be a member of the board (s. 7).

Casual vacancies are filled up by the council by whom the vacating member was originally chosen (s. 9).

The rules as to meetings of the board are prescribed in a schedule to the Act (sched. ii.).

At its annual meeting in November in each year the board appoints a visiting committee of not less than eleven members for every asylum, and delegates to each committee such powers and duties as it thinks fit. The following provisions of the Lunacy Act, 1890, apply to each visiting committee:—Vacancies to be filled up (s. 176, Act of 1890); Duration of office (s. 172, *ibid.*); Examination of accounts (s. 173, *ibid.*); Members of visiting committee not to be interested (s. 174, *ibid.*); Meetings of visiting committee (s. 175, *ibid.* except par. 1); Clerk to visiting committee (s. 176, *ibid.*); The visiting committees, in turn, may appoint sub-committees (s. 13, subss. (1) and (2)).

The board may also appoint out of its own body other committees, either of a general or special nature (s. 13, subss. (3)), and has practically the same powers, as regards the appointment of officers, as exist under the general Lunacy Acts.

The board has also practically the same rights and duties with regard to asylum accommodation as local authorities under the Act of 1890. (See *ASYLUMS.*)

All expenses incurred by the board in the execution of its duties shall be paid out of an "asylums fund," and sums in the nature of revenue are carried to this fund (s. 23, subss. (1) and (2)).

The sums charged for private patients and any excess created under the enactments are dealt with and applied as under the general Lunacy Act, 1890 (*ibid.* subs. (3)).

The amounts to be contributed by the county and the county boroughs respectively are estimated by the board before the 1st of March in each year, and divided between them according to their respective rateable values, with an "added sum" of £4000, or such other amount as may be fixed by agreement or arbitration (ss. 24 and 25). Payment of the respective amounts is enforced by the following machinery:—Before the 1st of March in each year the chairman of the board sends to the county council and to the council of each county borough a precept for payment of the amount due. If the precept is not complied with, two justices issue a warrant, and the treasurer of the board has, in regard to it, the same powers as a guardian or overseer for the recovery of county rates and surcharges (s. 26).

At.—When "at" is used in a will or deed as descriptive of the situation or locality of property, its meaning is synonymous with "in." But in such a phrase as "at or within" the word "at" is rather used in the sense of "near to," or "adjacent to" (*Evans v. Angell*, 1859, 26 Beav. 202; *Howes v. Howes*, 1878, 8 Ch. D. 758). A legacy given "at" a particular age

or time confers a contingent interest, being equivalent to "if the event shall happen" (*Darke v. Hodgson*, 1860, 1 Drew. & Sm. 568; Williams, *Executors*, 1237). Generally, for the construction of "at" in wills and elsewhere, see Jarman, *Wills*; and Stroud, *Jud. Dict.*

At and from.—These words are those employed in the usual voyage policy of marine insurance, to denote the place or point at which the risk undertaken by the underwriters is to begin, whether the policy be on ship, freight, or cargo for that voyage. See MARINE INSURANCE, *Beginning of Risk*.

Atheism.—See BLASPHEMY; EVIDENCE; PARENT AND CHILD.

Attaché.—One attached to an embassy or legation to learn diplomatic practice. The term is also loosely used to describe all subordinate secretaries of an embassy or legation.

Attachés are the lowest grade in the diplomatic hierarchy, and from among them secretaries of embassy and legation are usually selected. They enjoy the privileges and immunities granted to all members of embassies and legations (see *Parkinson v. Potter*, 1886, 16 Q. B. D. 152; *Macartney v. Garbutt*, 1890, 24 Q. B. D. 368). See DIPLOMATIC AGENTS; EXTE RRITORIALITY.

Attachment of Debts.—Proceedings by which, after any person has obtained a judgment or order for the recovery or payment of money in any Court having jurisdiction in equity, or in law and equity, he may, under the provisions of Order 45, R. S. C., 1883, which embodied, with certain alterations, the provisions of the Common Law Procedure Act, 1854, or of similar provisions in inferior Courts, procure an order for the payment to him of all debts owing or accruing due, to his judgment debtor from third persons, in satisfaction, or part satisfaction, of his judgment or order. This third person is called the garnishee, the person "warned" (French. *garer* or *garnir*, to warn)—an old term long in use before it obtained its special use in the proceedings for attachment of debts, or garnishee proceedings as they are usually called.

The garnishee order is obtained upon an *ex parte* application to the Court or a judge, upon an affidavit made by the judgment creditor or his solicitor, setting forth the judgment or order, stating that it is still unsatisfied, that the garnishee is indebted to the judgment debtor and is within the jurisdiction of the Court; and, if it is a judgment of an inferior Court or of a foreign tribunal, that it has been removed into Court, or been registered under the provisions of the Judgments Extension Acts of 1868 and 1882, 31 & 32 Vict. c. 54, and 45 & 46 Vict. c. 31.

For the purpose of ascertaining debts due to the judgment debtor, he may be examined in order that he may make the necessary disclosures (Order 42, r. 32).

Upon service of the order *nisi*, which should be personal if possible, then, if the garnishee does not appear and dispute liability, he must pay forthwith the amount due from him to the judgment debtor, or an amount equal to the judgment debt, into Court; if not, the order may be made

absolute, and execution issued against the garnishee, without any previous writ or process, for the amount. If, on appearance, however, to the order *nisi*, the garnishee can show some *bond fide* ground for disputing his liability, an order may be made directing an issue for determining the question, in the same manner as an action is tried (Order 45, r. 4); or a special case may be stated, if the question raised is one of law.

With consent of the parties, the judge or Master may decide the question summarily. He then acts as arbitrator, and there is no appeal (*Eade v. Winsor*, 1878, 47 L. J. C. P. 584). The garnishee may also suggest that the debt sought to be attached belongs to some third person; or that some third person has a lien or charge upon it. In that case (r. 5), such person is ordered to appear and state the nature and particulars of his claim.

On the hearing of this claim, or in case of non-appearance, an issue as before mentioned may be directed, or order made, either barring the claim, or such order as may be just, according to the circumstances. The costs, both of the garnishee's appearance and that of any other party, are (r. 9) in the discretion of the Court or judge. The state of accounts between the garnishor and the garnishee will not be inquired into; but execution will issue for the whole amount of the debt admitted to be due to the judgment debtor. But any set-off (*q.v.*) or cross debt arising before the garnishee order, between the judgment debtor and the garnishee, may be given effect to.

The judgment debtor need not be served with notice of the garnishee proceedings.

On service of the order *nisi* a charge (*q.v.*) is created (r. 2) on the debt owing by the garnishee to the judgment debtor; but not until then; so that a solicitor who had obtained a charge for costs on money in the hands of a receiver, and served it before the service of the garnishee order *nisi*, was held entitled to priority over the garnishor (*Hamer v. Giles*, 1876, 11 Ch. D. 942). Moreover, the order does not transfer the debt so as to make the garnishor a creditor of the garnishee (*In re Combined Weighing, etc. Co.*, 1889, 43 Ch. D. 99, where the garnishor was held not entitled as a creditor to petition for the winding up of a company); nor is it a final judgment in respect of which a bankruptcy notice may be issued (*Ex parte Chinery*, 1884, 12 Q. B. D. 342); and under the Bankruptcy Act, 1883, s. 45, an attachment of debts is not completed so as to entitle the judgment creditor to retain the benefit of his attachment until he has actually received the debt; and payment into Court is not such actual receipt (*Butler v. Wearing*, 1882, 17 Q. B. D. 182).

Where money was paid by the garnishee under an order absolute, made owing to a mutual mistake of the garnishor and garnishee, it was held that the order must be set aside and the money refunded (*Moore v. Penachey*, 1892, 66 L. T. 198); and see *Burrell v. Read*, 1894, 10 T. L. R. 36, where the Court of Appeal set aside an order absolute charging a sum, which was proved in an issue to be not the money of the garnishee, but of another person.

On payment of the debt by the garnishee, or in case execution is levied upon him, this is a valid discharge to him as against the judgment debtor, to the amount paid or levied; although the proceedings for attachment and the judgment or order against the judgment debtor may be set aside or reversed (r. 7).

If the garnishee has been compelled to pay the debt to the Sheriff under an execution issued by the judgment debtor, on a judgment which he has himself obtained against the garnishee, the latter is discharged from

liability to pay under the garnishee order (*Turnbull v. Robertson*, 1878, 38 L. T. 389).

Both legal and equitable debts may be attached; and not only a debt actually payable when the order is made, but a debt certain payable at a future day in instalments (*Tapp v. Jones*, 1875, L. R. 10 Q. B. 591); and the moment there is a judgment for a certain amount, there is a debt which can be attached; although judgment is not entered up until after the garnishee proceedings (*Holtby v. Hodgson*, 1889, 24 Q. B. D. 103).

For the cases turning upon the question whether there is "debt owing or accruing," see Chit. Arch. Pr. 928-932. The half-pay of a military or naval officer cannot be attached; nor unliquidated damages, or money payable on a contingency; nor debts *bond fide* assigned by the judgment debtor before judgment or attachment; nor a superannuation allowance, being a mere gratuity; nor unearned salary; nor seamen's wages, under 17 & 18 Vict. c. 104, s. 233; nor labourers' wages, under the Wages Attachment Abolition Act, 1870, 33 & 34 Vict. c. 30; nor a dividend payable in bankruptcy (*Prout v. Gregory*, 1889, 24 Q. B. D.); and for other cases see Chit. Arch. Pr. 928-932.

A garnishee may be ordered to pay his debt to the judgment creditor although more than six years have elapsed since the judgment (*Fellows v. Thornton*, 1884, 14 Q. B. D. 335).

See EXECUTION.

Attachment, Writ of.—The writ of attachment is one of the writs by which certain judgments, or orders of the Courts, may be enforced by way of execution (R. S.C., Order 42, 1883). As to its employment in cases of contempt of Court, and for committal in the like cases, see CONTEMPT OF COURT. The old Court of Chancery usually enforced its decrees or orders by this process; and now, by Order 44, r. 1, the writ is to have the same effect as it formerly had when issued out of the Chancery Division. Under the common law a judgment-creditor who resorted to it lost his right against the property of the debtor; and it was, therefore, rarely used in the Common Law Courts, except as a mode of punishing a party in contempt. But this was never its effect in Chancery (*Roberts v. Ball*, 1855, 24 L. J. Ch. 471).

The form of the writ is a command, addressed to the sheriff or bailiff (*q.v.*) of a County Court, or the like officer in other Courts, to attach the debtor and bring him before the Court, to answer the disobedience or other wrongdoing in regard to the order of the Court. It must also be endorsed with the mandatory part of the judgment, or order, in question, and explain the purpose for which it is issued.

If the decree or order is for the payment of money, or costs, it can only be enforced by this writ if the case falls within the exceptions contained in sec. 4 of the Debtors Act, 1869; the extreme limit of imprisonment being also thereby limited to one year. Moreover, in the case of exceptions 3 and 4 of this section, viz. default by trustees and by a solicitor in paying costs which he has been ordered to pay as an officer of the Court, sec. 1 of the Debtors Act, 1878, 41 & 42 Vict. c. 54, enacts that the Court may, on inquiry, either grant or refuse the writ, or discharge from arrest or imprisonment.

Other purposes for which the writ may be employed are the recovery of any property other than land or money, and the doing of any act, or the abstention from doing any act (Order 42.)

It is included in the term "writs of execution" by r. 8 of that Order; and it can only be issued by leave of the Court, or a judge, to be applied for on notice to the party against whom the writ is to issue (Order 44, r. 2). The judgment or order, for non-performance of which the writ is to issue, must have been duly served in accordance with Order 41, r. 5, and have a memorandum endorsed thereon as to the consequences of neglect in obeying it; and service thereof must be personal, unless substituted service is allowed.

The application for leave to issue the writ is made on summons or motion, and is usually made to a judge at chambers. The notice of motion, or the summons, need not be personally served, but may be left with the solicitor on the record (*Browning v. Sabin*, 1877, 5 Ch. D. 511; and *In re a Solicitor*, 1880, 14 Ch. D. 152). But the practice is different where the application is for committal for contempt (*q.v.*).

Pending bankruptcy proceedings, a debtor, even if he is within the exceptions of sec. 4 of the Debtors Act, 1869, is protected from attachment (*Cobham v. Dalton*, 1875, 10 Ch. 655); but the acceptance of a composition, or scheme under the Bankruptcy Act, 1883 (see BANKRUPTCY), will not bind a creditor as to a debt or liability from which the debtor is not relieved by his discharge in bankruptcy, unless the creditor assents to the composition or scheme (*Pashler v. Vincent*, 1878, 8 Ch. D. 825, and Bankruptcy Act, 1883, s. 19). Bankruptcy, however, does not of itself prevent the writ from being issued, if the bankrupt has means (*Shine v. Shine* [1893], Prob. 289). Like other writs of execution (see EXECUTION), the writ of attachment issues from the district registry, when a cause or matter is proceeding there; unless the Court or a judge otherwise directs (Order 55, r. 4). And every inferior Court which has or may have jurisdiction in equity, or at law and in equity, and in Admiralty conferred upon it, has, or is to have, the like power of issuing attachment (Judicature Act, 1873, s. 89). In the County Court the writ is delivered for execution to the high bailiff of the Court, who is responsible in like manner as the sheriff. The sergeant-at-mace of the Mayor's Court of London, performs the same duties for that Court. Several writs may be concurrently issued into different counties; but if more than one is executed, the party issuing them would be liable to an action.

As to execution of the writ by the sheriff, see Dan. Ch. Pr. pp. 886-889; and Chit. Arch. 951-953.

An attachment for non-performance of a judgment or order is not bailable; and the person, if taken, must be committed to or detained in prison, and not suffered to go at large.

If the sheriff returns *non est inventus*, alias and pluries writs may be issued until the party be found; but if more than a year has elapsed the delay must be accounted for, and proof given that the order has not been obeyed (see Annual Practice, 1897, p. 845).

Upon the return of *non est inventus*, or if the person attached, after arrest, does not obey the decree or order, a commission of sequestration may be issued against him.

For the purpose of obtaining his discharge before the expiration of the term of imprisonment, the party must show to the Court, or a judge, the commission of irregularities in the service of the order or the execution of the writ; or that the act required to be done has been done. If the latter fact is certified by an officer of the Court, the application is *ex parte*; if otherwise, the party issuing the writ must be served with notice of the application.

Attainder.—This word seems primarily to signify the attainment of an end, or in legal process a conviction, but is fancifully connected with a taint or stain, so as to imply not merely the process or results of a conviction, but the corruption of blood supposed thenceforth to ensue.

Attainder followed upon judgment (not merely conviction) in cases of treason or capital felony, or judgment of outlawry, in case of a capital offence, where the person charged fails to answer the charge before a Court of justice.

By attainder in case of treason, lands were forfeited to the Crown; estates of inheritance for ever, interests for life, or for years, during such time as they lasted.

By attainder for a capital felony, lands were forfeited to the Crown for a year and a day, and then escheated to the lord of the fee.

The Statute de Donis mitigated for a while the effect of an attainder: an estate tail was regarded as a series of life estates, and the attainted tenant only forfeited his life interest. But 26 Hen. VIII. c. 13, assimilated estates tail in this respect to other estates of inheritance.

The Statute 54 Geo. III. c. 145, limited the forfeiture or escheat of real estate to cases of attainder for treason or murder.

Forfeiture of goods which, previous to 33 & 34 Vict. c. 23, ensued upon conviction, was not a result of attainder, for attainder followed, not upon conviction, but upon judgment of death or outlawry.

The doctrine of corruption of blood had a marked effect upon the descent of peerages. To whatever source we trace the origin of the peerage, this doctrine, apart from any idea of forfeiture, would destroy the succession to the title. The Act of George III., above cited, applied generally to corruption of blood, and so narrowed the effect of attainder, in the case of dignities, to conviction or outlawry for high treason and murder.

But attainder upon judgment or outlawry no longer exists; 33 & 34 Vict. c. 23, abolishes attainder, corruption of blood, forfeiture and escheat, where these followed upon "confession, verdict, inquest, conviction, or judgment of or for any treason, felony, or *felo de se*." Forfeiture is now consequent only upon outlawry.

The process of attainder was by judgment of death or outlawry, or by bill. Political offences were first dealt with by Bill of Attainder in 1549. The Parliament of that year presented, in the form of legislation used at that date, a petition that the Yorkist lords might be attainted of high treason and their estates and dignities declared to be forfeited. At this time legislative procedure was changing from petition addressed to the Crown, followed by an ordinance, to the modern practice of sending bills which have passed both Houses to receive the royal assent. The petition is described as "*Lecta audita et matura deliberatione plenius intellecta, de avisamento et assensu Dominorum Spiritualium et Temporalium et Communitatis regni Angliæ*" (*Rot. Parl.* v. 346, 350). The king gave his assent, saving his prerogative of pardon, and excepting two of the persons whom it was proposed to attain. This procedure differs from the appeal in Parliament, made by individuals to the Lords (as in 1387), a practice forbidden by 1 Hen. IV. c. 14, and from the impeachment in which the Commons charged an offender at the bar of the House of Lords. Henceforth Bills of Attainder superseded for nearly two hundred years the process by impeachment; as a mode of dealing with political offenders.

The procedure is like that of an ordinary public bill. The bishops take

full part, though in an impeachment they withdraw before judgment is given. The bill usually begins in the Lords, though, as in the case of Bishop Atterbury in 1722, it may begin in the Commons. The parties charged may defend themselves, appear by counsel at the bar of each House, and call witnesses.

A bill for reversing an attainder goes through a curious and exceptional form. It is first signed by the Crown and presented by a Lord to the House of Lords by royal command; there it passes through the ordinary stages, and is transmitted to the Commons, where it is essential that the consent of the Crown should be signified before the first reading of the Bill (May, *Parliamentary Practice*, 10th ed., 809).

It would seem, in fact, to be an exercise of the prerogative of mercy in a case where, as verdict and sentence are comprised in an Act of Parliament, the Houses must join with the Crown in their reversal.

Attaint.—In civil cases the verdict of a jury could at one time be challenged by writ of attaint, under which a jury of twenty-four was summoned to determine whether the first jury had sworn falsely (Hawk., P. C., bk. i. c. 72, s. 5; bk. ii. c. 22, s. 20). This procedure became discredited in consequence of the assertion of the independence of jurors in *Bushel's* case (see JURY), 1670, 6 St. Tri. 99, and obsolete when motions for new trials were established. It was abolished by s. 60 of the County Juries Act, 1825 (6 Geo. IV. c. 50), with a saving as to the punishment of jurors who consent to be "embraced" (s. 61). See EMBRACERY.

[The authorities on this subject are collected in Beven, *Negligence*, 2nd ed., 277, n. 1; Stephen, *Hist. Crim. Law*, i. 306.]

Attempt.—1. At common law the attempt to commit a treason, felony, or indictable misdemeanour, is itself an indictable misdemeanour, punishable by fine or imprisonment without any specified limit (Stephen, *Dig. Crim. Law*, 5th ed., art. 51; and see ARBITRARY PUNISHMENT). By attempt is meant something more than (1) forming the intention to commit the offence (which is not punishable); or (2) the combining with others for the purpose of committing it, which is conspiracy; or (3) the inciting others to commit it. Some overt act must be done which is more than intention or preparation, and which aims at, but falls short of, the complete offence (*R. v. Ransford*, 1894, 13 Cox C. C. 9; *R. v. Henslo*, 1870, 11 Cox C. C. 570). It is not necessary that it should have been legally or physically possible for the offender to commit the full offence (*R. v. Brown*, 1890, 24 Q. B. D. 357; *R. v. Ring*, 1892, 61 L. J. M. C. 116; *R. v. Williams* [1893], 1 Q. B. 320).

2. In numerous cases the attempt to commit a crime is specifically punished by statute either as felony (as in the case of attempts to murder) (24 & 25 Vict. c. 100, ss. 11–15); or to choke, with a view to committing an indictable offence (c. 100, s. 21); or as a misdemeanour punishable in a defined manner. See ABOMINABLE CRIME; ARSON; EXPLOSIVES; MALICIOUS DAMAGE.

3. On an indictment for felony or misdemeanour, the jury may, if the evidence so warrants, find the accused guilty of the attempt, but only if it be a misdemeanour (14 & 15 Vict. c. 100, s. 9; *R. v. Connell*, 1853, 6 Cox, 178).

[See also Stephen, *Hist. Crim. Law*, ii. 221–225; Arch. Cr. Pl., 21st ed., 2, 403; 1 Russ. on *Crimes*, 6th ed., 195; and, for the fullest consideration, Mayne, *Criminal Law of India*, 1896, 853–863.]

Attendant Terms.—An attendant term may be defined to be a satisfied term which, before the enactment of the Satisfied Terms Act, 1845, hereafter to be further noticed, became, upon the satisfaction of the purposes for which it had been created, attendant upon the inheritance, either by construction of law or by express declaration. The origin of such terms was as follows. In the reign of Elizabeth, the old form of mortgage, which was a feoffment in fee, subject to a condition of defeasance upon repayment of the mortgage money with interest on a specified day, was superseded in practice by a demise for a long term of years, made either to the mortgagee, or to a trustee for him. Long terms were also created for the purpose of securing charges for portions, and other purposes, in settlements of real estate. On satisfaction of the mortgage or other charge, the term, unless destroyed by a proviso for cesser, subsisted as a valid legal estate, sufficient to maintain or defend an action of ejectment at law. In equity, the person in whom it was vested was regarded as a constructive trustee for all persons interested in the fee out of which the term was derived,—that is, the reversion upon the term,—according to their respective estates or interests, whether as owners or incumbrancers, and in accordance with the priorities subsisting between them. Such a term was said to be attendant upon the inheritance by construction of law. Upon a sale of the reversion to a purchaser for valuable consideration, the term was by the common practice assigned to a trustee, upon trust for the purchaser and to attend the inheritance. The term was then said to be attendant upon the inheritance by express declaration. A purchaser for value who had obtained such an assignment might in equity protect himself, by means of the term, against all dealings with the reversion, having an origin later than the creation of the term, whether by way of conveyance, settlement, or incumbrance, of which he had no notice at the time of his purchase. Against claims to dower, the term, if attendant by express declaration, was a protection, even with notice. For detailed information upon this subject, and upon the general practice relating to the assignment of attendant terms, see *Co. Lit.* 290b, note (1), by Butler, s. xv.; *Second Report of the Real Property Commissioners*, pp. 8–14; *Bythewood's Precedents*, by Parker and Stewart, vol. vii. p. 50; *Jarman and Bythewood*, by Sweet, vol. ix. p. 108; Davidson, *Conc. Prec.*, 15th ed., p. 20.

Successive mortgages, or successive settlements, frequently gave rise to a succession of attendant terms; and it frequently happened in practice that the abstract of the title to the inheritance was accompanied by abstracts of the titles to several attendant terms, much exceeding in bulk the title to the inheritance. Since the chief object of attendant terms was to enable an action of ejectment to be maintained at law, the deduction of the title thereto was peculiarly strict. Moreover, where some only of several executors had proved a will, the title to a term of years could not, before 20 & 21 Vict. c. 77, s. 79, be deduced through the last survivor, unless he had also survived the executors who had refused probate. By reason of these circumstances, attendant terms were the cause of great delay and expense.

The Satisfied Terms Act, 1845, 8 & 9 Vict. c. 112, in effect enacted (s. 1) that every satisfied term which, either by express declaration or by construction of law, should, on the 31st December 1845, be attendant upon the inheritance or reversion of any lands, should absolutely cease and determine, except that such term should afford to every person the same protection as it would have afforded if it had continued to subsist, but had

not been assigned or dealt with after the said date; and (s. 2) that every term becoming satisfied after the said date, which, either by express declaration or by construction of law, should after that day become attendant as aforesaid, should thereupon immediately cease and determine.

It appears to have been held, in *Shaw v. Johnson*, 1861, 1 Drew. & Sm. 412, by Kindersley, V. C., that a term which had been assigned to attend the inheritance would be revived upon a mortgage being made by the owner of the inheritance, if the transaction included an agreement that the term should be assigned to a trustee for the mortgagee. And in *Anderson v. Pignet*, 1872, L. R. 8 Ch. 180, it was held that a term vested in a trustee for a mortgagee, who releases the mortgage debt on obtaining a conveyance of the equity of redemption, is not a satisfied term within the meaning of the Act. There may be some difficulty in reconciling these cases with *Doe v. Price*, 1847, 16 Mee. & W. 603; *Doe v. Mouldsdale*, *ibid.* 689.

Attestation.—1. *Of Wills.*—In the case of all wills of personalty made before 1st January 1838, no signature or attestation was necessary, but the Statute of Frauds, 1677, s. 5, required that all devises of lands should be in writing, signed by the devisor or by some other person in his presence, and by his express directions, and should be attested and subscribed in the presence of the devisor by three or four credible witnesses, or else they should be utterly void and of none effect. It was not necessary that the attesting witnesses should be present at the time of the signature of the will, but each witness was bound to see the testator acknowledge his signature, and subscribe his name in the presence of the testator (*Stonehouse v. Evelyn*, 1734, 3 P. Wms. 253). The Statute of Frauds did not apply to wills of copyholds and leaseholds. No legatee was considered a credible witness, but the law on this point was altered by the Statute of 25 Geo. II. c. 6, which declared *inter alia* that an attestation by a legatee should be good, but his legacy void. Although no attestation of a will of personal property was then necessary, Sir William Grant, in *Lees v. Summersgill* (1808, 17 Ves. 508), held that this statute extended to all wills, but his decision was overruled in *Emmanuel v. Constable* (1827, 3 Russ. & M. 438), and it was decided that a legacy to an attesting witness of a will of personal estate only was not void.

Sec. 9 of the Wills Act, 1837, in which Act will is defined so as to include codicil, provides that every will shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and that such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and that such witnesses shall attest and subscribe the will in the presence of the testator, but that no form of attestation shall be necessary.

The Wills Act Amendment Act, 1852, explains at great length the meaning of the words "at the foot or end" thereof.

The Wills Act, 1837, also provides that a will shall not be void by reason of the incompetency of an attesting witness; that a gift to an attesting witness or to his or her husband or wife shall be void; but the evidence of the witness shall be admissible to prove the execution of the will; that where, by a will, land is charged with the payment of debts, a creditor, or the husband or wife of a creditor whose debt is so charged, shall be a competent witness to prove the execution of the will; and that an executor is a competent attesting witness of a will.

A legacy or residue bequeathed by will is not rendered void by the fact of a codicil to the will being attested by the legatee, where the codicil gives him nothing (*Gurney v. Gurney*, 1855, 3 Drew. 208); nor does subsequent marriage of an attesting witness affect a benefit given by will to the husband or wife of the attesting witness (*Thorpe v. Bestwick*, 1881, 6 Q. B. D. 311). But it has been held that, where a solicitor attests a will, he cannot charge profit costs in respect of work done in relation to the estate (*In re Pooley*, 1889, 40 Ch. D. 1).

Any soldier, being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate, as he might have done before the making of the Wills Act, 1837; but the wills of seamen and marines of the royal navy and marines must be made in accordance with the provisions of the Navy and Marine (Wills) Act, 1865.

Although no form of attestation is necessary, a memorandum of attestation, stating that the signature was made or acknowledged by the testator in the presence of the witnesses, both being present at the same time, and that they subscribed their names in his presence, is desirable, as it affords a presumption of due execution. In the absence of such a memorandum, the Court will require proof that the provisions of the Wills Act in this respect have been complied with. If there is an attestation clause, it is not essential that it should occur at the end of the will (*In bonis Chamney*, 1849, 1 Rob. Eccl. 757).

Sec. 10 of the Wills Act, 1837, provides that an appointment by will may be validly executed in manner provided by sec. 9 of the same Act, although other forms of execution or solemnity are required by the instrument creating the power.

2. *Of Deeds*.—No attestation of a deed (*q.v.*) is necessary at common law.

3. *Of Bills of Sale*.—See BILLS OF SALE.

4. *Of Warrant of Attorney*.—See WARRANT OF ATTORNEY.

Attorney.—A person appointed to act for another. The term was chiefly employed to denote either a private attorney, *i.e.* a person acting under a power of attorney as agent on behalf of another (see POWER OF ATTORNEY), or an attorney-at-law who was a properly qualified law agent practising in the superior Courts of common law. In the latter sense the term is not now used, as by sec. 87 of the Judicature Act, 1873, it is provided that “all persons admitted as solicitors, attorneys, or proctors of, or by law empowered to practise in, any Court, the jurisdiction of which is hereby transferred to the High Court of Justice, or the Court of Appeal, shall be called Solicitors of the Supreme Court”; and the section proceeds to provide that persons subsequently admitted are to be entitled to the same name. See SOLICITOR.

Attorney, Power of.—See POWER OF ATTORNEY.

Attorney-General.—The Attorney-General is the chief law officer of the Crown, and a great officer of State, appointed by letters-patent, and he is *ex officio* head of the bar (*q.v.*) for the time being. The history of the office is somewhat obscure, but it would appear to have been established about 1277, when an *Attornatus-Regis*—as the Attorney-General was originally styled—was appointed to protect the interests of the

Crown, in cases affecting it before the Courts. The appointment was formerly made "*quamdiu se bene gesserit*," but is now "*durante bene placito*."

The English law officers, unlike the Lord Advocate and the Irish law officers, are not privy councillors (see Anson, *Law and Custom of the Constitution*, pt. ii. p. 192).

The Attorney-General superintends all proceedings at law or in equity affecting the royal prerogative, and is also the chief legal adviser of the various departments of government. In the House of Commons he is not a member of the Cabinet, but, as a member of the government, takes the principal charge of legal measures and affairs.

He prosecutes for the Crown in criminal matters and in revenue cases, and grants *fiats* for writs of error. There are many legal proceedings which by statute cannot be initiated without his sanction, *e.g.* proceedings by any local authority to prevent the pollution of streams (Public Health Act, 1875, s. 69); prosecutions for an offence under the Public Bodies Corrupt Practices Act, 52 & 53 Vict. c. 69; and as to the recovery of penalties, see Public Health Act, 1875, s. 253; Public Health (Officers) Act, 1884, s. 2; Public Bodies Corrupt Practices Act, 1889, s. 4 (1).

The Attorney-General, or, during the vacancy of the office of Attorney-General, the Solicitor-General (*q.v.*), may, in the exercise of his discretion, file an information for any misdemeanour whatsoever. In cases of libel, this procedure is confined to libels of so dangerous a nature as to require immediate action on the part of the law officers of the Crown. There is said to have been no *ex officio* information filed since 1850 (Blake Odgers, *Libel and Slander*, 3rd ed., p. 450).

The Attorney-General, as representative of the Crown in matters of criminal judicature, has power to enter a *nolle prosequi* (*q.v.*), and thereby to stay proceedings in any indictment or criminal proceeding, and he may do so *ex mero motu* without calling upon the prosecutor to show cause why that should not be done (*R. v. Allen*, 1862, 1 B. & S. 850).

Writs of Certiorari are granted to remove any conviction order or summary proceeding, on the motion or part of the Attorney-General acting officially as a matter of right, whether on behalf of the prosecution or defence, without any affidavit, and without service of any notice on the justices, as required in other cases. See Short and Mellor, *Practice of the Crown Office*; and see CERTIORARI.

The Attorney-General attends in peerage cases, as assistant to the Lords' Committees for Privileges.

In the matter of granting patents, the Crown exercises its discretion through the medium of the law officers and the Comptroller-General of the Patent Office, and the fiat of the Attorney-General is in most cases necessary to a petition for the revocation of a patent. See APPEALS; PATENTS.

In lunacy, the Attorney-General may, under certain circumstances, bring an action on behalf of an insane person. See LUNACY.

The Courts exercise over the Attorney-General the same authority which they exercise over every other suitor; and, accordingly, he would not be permitted to prosecute any proceeding which was merely vexatious and had no legal object (*R. v. Brown*, 1848, 11 Beav. 306).

The Attorney-General is the only legal representative of the Crown in the Courts (*R. v. Austen*, 1821, 9 Price, 142).

But during the vacancy of the office the whole business and authority of the Attorney-General devolve upon the Solicitor-General (*R. v. Wilkes*, 1770, 4 Burr. 2527, 2554, 2570).

The Attorney-General is an officer of the Crown, and in that sense only the officer of the public (*A.-G. v. Brown*, 1818, 1 Swans. 288).

He may properly take proceedings on behalf of the public when acts tending to the injury of the public are being done without lawful authority, even though no evidence be produced of actual injury having been inflicted (*A.-G. v. Shrewsbury (Kingsland) Bridge Co.*, 1882, L. R. 21 Ch. D. 75, 2; *Ware v. Regent's Canal Co.*, 1858, 3 De G. & J. 212; *A.-G. v. Cockermouth Local Board*, 1874, 18 L. R. Eq. 172).

Delay or laches (*q.v.*) may not be imputed to the Attorney-General, suing on behalf of the public, where it might be against an individual in a similar case (*A.-G. v. Bradford Canal Co.*, 1866, 15 L. T. N. S. 9).

Precedence.—After the 14th Dec. 1864, the Attorney and Solicitor General took precedence before all the serjeants (see *SERJEANTS-AT-LAW*); formerly they were accustomed to have place and audience next after the two most ancient of the serjeants, but before the others.

The Attorney-General, by an order of the House of Lords, has pre-eminence over the Lord Advocate (1834, 2 Cl. & Fin. 482).

Remuneration of and Right to Engage in Private Practice.—Formerly, the law officers were entitled to accept private practice without restriction, but important, although tentative, modifications of this privilege were introduced by regulations embodied in Treasury Minutes of 5th Dec. 1892, and 29th June 1894. These regulations, however, were cancelled by a Treasury Minute of 5th July 1895, which prescribes that for the future the Attorney-General and Solicitor-General—who are to receive salaries of £7000 and £6000 per annum respectively—shall not undertake business of any kind on behalf of private clients, and any law officer shall, on appointment to office, return any papers or briefs on behalf of private clients. Provision, however, is made for payment of fees, according to the ordinary professional scales, to the law officers in respect of such contentious business as relates to proceedings, civil or criminal, which have actually been commenced, and in which the Government represents the plaintiff, defendant, or prosecutor.

In all cases of contentious business, save certain ones specified, a law officer shall not be instructed unless, in the opinion of the Attorney-General for the time being, it is necessary in the interest of the public service that a law officer should appear.

Right of Reply.—The Attorney-General and the Solicitor-General, prosecuting in person, have a right of reply in all cases, whether evidence is or is not called for the defence (Resolutions of the Judges, 1884, 5 St. Tri. N. S. 32). Other counsel, even although representing the Crown, have no such right if the prisoner calls no witnesses. See *REPLY, RIGHT OF*.

The Attorney-General of the Queen Consort.—The Queen Consort is, in law, a public person exempt and distinct from the king. She may sue and be sued without the King being joined; but she has an Attorney-General, in whose name she sues and is sued. This privilege does not extend to a Queen Dowager.

The Attorney-General to the Prince of Wales.—The Prince of Wales, as Duke of Cornwall, has an Attorney-General, in whose name he may sue and be sued for matters relating to that duchy (*A.-G. to the Prince of Wales v. Sir T. St. Aubyn*, 1811, Wight. 167, 246, 255, 256; 12 R. R. 718, *n.*; *A.-G. of the Prince of Wales v. Lamby*, 1848, 11 Beav. 213; *A.-G. of the Prince of Wales v. Crossman*, 1866, L. R. 1 Ex. 381).

The Attorney-General of the County Palatine of Lancaster.—There is an Attorney-General of the County Palatine Court.

See COUNTY PALATINE COURT OF LANCASTER; and Daniell, *Chancery Practice*, 6th ed., vol. i. p. 56.

In almost all the Crown colonies there is an Attorney-General, who is appointed from home by warrant under the signet and sign manual, and whose duties are in the main similar to those of the same officer in England. In self-governing colonies, the Attorney-General is appointed by the Administration of the colony.

Clark, *Colonial Law*.

Attornment.—The term attornment, in the strict sense which prevailed in the old law of real property, signified "the agreement of the tenant to the grant of the seignior, *i.e.* to become tenant to a new lord of the seignior; or of a rent; or the agreement of the donee in tail, or tenant for life, or years, to a grant of a reversion or of a remainder made to another, *i.e.* to become connected with him in the relation of landlord and tenant of the tenement" (Sheppard's *Touchstone*, by Preston, ii. 253). Modern legislation has rendered obsolete most of the old learning on the subject, though it is still customary to insert an attornment clause in mortgage deeds; and the word is now often used in the sense of an acknowledgment or admission of the existence of a tenancy, without special reference to a transfer of the title to the reversion. This is chiefly important in relation to the doctrine of estoppel. The word attornment is also used in an analogous sense in connection with the law of BAILMENTS (*q.v.*).

Attornment by the Tenant of Land.—The strict sense of the word attornment was closely related to the idea of feudal possession. "At common law, reversions and remainders, lying in grant and not being capable of being perfected by livery, as in the case of the grant of a freehold, or by entry in the case of the grant of a leasehold interest, required, for many purposes, an attornment of the tenant of the particular preceding estate; but when such attornment was obtained, the reversion or remainder, or the estate carved out of it, vested so as to give the grantee the right to the rents and services attached to the reversion, and, since 32 Hen. VIII. c. 34, to sue on any covenant running with the reversion" (*per curiam*, *Doe v. Brown*, 1853, 2 El. & Bl. 331). An attornment was not necessary where the reversion was transmitted by descent or devise (*Doe v. Smith*, 1838, 8 Ad. & E. 255); but in cases of transfer or grant it was necessary that the tenant in possession should attorn in order to complete the title of the grantee. The attornment, when made, related back to the date of the grant; but by sec. 9 of the Statute 4 Anne, c. 16, it was provided that "all grants or conveyances, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made." The grant of a reversion is now, therefore, good as from its date without any attornment; the tenant at once becoming tenant of the new landlord upon the terms of his existing lease (*Brydges v. Lewis*, 1842, 3 Q. B. 603). The 10th section of the Act protects the interest of the tenant by providing that he is not to be prejudiced by pay-

ment of rent to the grantor before notice of the grant. The statute does not apply to a lessee who has assigned away all his estate and interest before the lessor assigns the reversion; the assignee of the reversion cannot sue him for rent without an attornment (*Allcock v. Moorhouse*, 1882, 9 Q. B. D. 366). The grant of a term of years out of a remainder or reversion is a "grant of a reversion" within the meaning of the statute (*Doe v. Brown*, 1853, 2 El. & Bl. 331), though in one case Page Wood, V. C., seems to have held the contrary (*Edwards v. Wickwar*, 1866, L. R. 1 Eq. 403).

Under the old law, an attornment to a stranger by the tenant in possession was equivalent to a dispossession of the reversioner who had been "in possession by means of his tenant." This effect of an attornment was abolished by sec. 11 of the Statute 11 Geo. II. c. 19, except in the case of an attornment "made pursuant to, and in consequence of, some judgment at law, or decree or order of a Court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited."

Though attornment is now unnecessary, it is sometimes advisable for an assignee of the reversion to procure an attornment from the tenant. In the first place, this is an act of ownership, which is admissible in evidence to prove his title as against future occupiers, whether claiming under the tenant or not (*Doe v. Edwards*, 1836, 5 Ad. & E. 95). And, as against the tenant himself, in an action for rent or for use and occupation, proof of an attornment by the defendant to the plaintiff is strong *prima facie* evidence that the relation of landlord and tenant existed between them (*Gravenor v. Woodhouse*, 1822, 1 Bing. 38; 25 R. R. 587), and operates as an estoppel, unless the defendant can show that it was obtained by fraud or misrepresentation (*Doe v. Brown*, 1837, 7 Ad. & E. 447), or that he has attorned by mistake to a person who had no title (*Bayley, J., Cornish v. Searell*, 1828, 8 Barn. & Cress. 471; see *Carlton v. Bowcock*, 1884, 51 L. T. 659). A person who, on the execution of an agreement for a demise to him, procures attornments from the occupiers of the land, is in the same position as if he had occupied himself, and is accordingly liable for use and occupation (*Neal v. Swind*, 1832, 2 Crompt. & J. 377). An attornment to a third party by a tenant from year to year is a disclaimer or renunciation of his character as tenant, the effect of which is that the landlord may determine the tenancy without notice (*Doe v. Evans*, 1841, 9 Mee. & W. 48).

If a receiver has been appointed by the Court, and the tenants attorn and pay rent to him, a tenancy by estoppel is created which enables the receiver to distrain for rent in his own name (*Dancer v. Hastings*, 1826, 4 Bing. 2; 12 Mo. 34); but the attornment does not enure for the benefit of the person who has the legal estate so as to entitle him to distrain (*Evans v. Matthias*, 1857, 7 El. & Bl. 590). Where a receiver is appointed by the County Court under the provisions of the Tithe Act, 1891, the occupiers of the lands are required to attorn tenants to him. If any occupier refuses, and it becomes necessary to enforce payment of rent in arrear, the receiver is required to apply to the Court for an order authorising him to distrain in the name of the owner (Tithe Act, 1891, rules 18 and 20).

An attornment may be made by using any words, written or spoken, that import an assent or agreement to become tenant, or by the payment of rent, or of a nominal sum in the name of attornment (see Sheppard's *Touchstone*, by Preston, ii. 261).

A mere attornment, whereby a tenant puts one person in the place of another as his landlord, continuing to hold on the same terms as before, does not require a stamp (*Doe v. Edwards*, 1836, 5 Ad. & E. 95). But a stamp is necessary when a document, purporting to be an attornment or acknowledgment, is really intended to operate as a contract, or to be evidence of a contract (*Doe v. Frankis*, 1840, 11 Ad. & E. 792). Thus, an agreement whereby one person agreed to attorn and become tenant to another of certain lands, "to hold the same for such time and on such conditions as might be subsequently agreed on," was held to require a stamp as an agreement for a new tenancy (*Cornish v. Searrell*, 1828, 8 Barn. & Cress. 471).

The subject of attornment is of special importance in the case of lands in mortgage. Formerly, a lease made by a mortgagor in possession, after the mortgage and without the authority of the mortgagee, did not create any tenancy as against the mortgagee (*Keech v. Hall*, 1778, 1 Doug. 21; *Moss v. Gallimore*, 1779, 1 Doug. 279), and the mortgagee could not recover rent from the lessee either by action or by distress (*Rogers v. Humphreys*, 1835, 4 Ad. & E. 299). But if the lessee attorned to the mortgagee, a new tenancy was created, which was presumptively a tenancy from year to year (*Doe v. Bucknell*, 1838, 8 Car. & P. 566; *Doe v. Ongley*, 1850, 10 C. B. 25). The same result followed if the mortgagee claimed and received rent from the lessee without setting up the lease, though evidence might be given to show that the mortgagee had authorised the mortgagor to grant the lease, or that he claimed the rent, and that the lessee paid it, on the basis of the lease (*Corbett v. Plowden*, 1884, 25 Ch. D. 678). The same principles seem to have applied to the rarer case of a lease made by a mortgagee in possession before foreclosure, unless the lease was made "to avoid an apparent loss, and merely in necessity" (*Ld. Macclesfield, L. C., Hungerford v. Clay*, 1722, 9 Mod. Ca. 1). Sec. 18 of the Conveyancing Act, 1881, confers powers of leasing both on mortgagors in possession and on mortgagees in possession, "unless a contrary intention is expressed in the mortgage deed, or otherwise in writing." But attornment is still necessary in the case of leases to which the statutory powers do not apply.

A mere notice by the mortgagee to the lessee, requiring him to pay rent, does not make the lessee a tenant of the mortgagee (*Evans v. Elliot*, 1838, 9 Ad. & E. 342; *Hickman v. Machin*, 1859, 4 H. & N. 716); nor does the mere fact that the lessee remains in possession after such notice, constitute any evidence from which a tenancy to the mortgagee can be inferred against the lessee (*Towerson v. Jackson* [1891]; 2 Q. B. 484). But an attornment by the lessee after notice of the mortgage, or the payment of rent to the mortgagee under threat of eviction, creates a tenancy between them. On the other hand, it is equivalent to an eviction by title paramount, and may therefore be set up by the lessee, if the mortgagor sues or distrains for rent accrued due after such notice and attornment (*Mayor of Poole v. Whitt*, 1846, 15 Mee. & W. 571). As to rent due and unpaid before the notice, payment to the mortgagee under constraint is equivalent to payment to the mortgagor (*Johnson v. Jones*, 1839, 9 Ad. & E. 809; *Underhay v. Read*, 1887, 20 Q. B. D. 209).

Attornment by Mortgagor to Mortgagee.—It is common to insert in mortgage deeds an attornment clause whereby the mortgagor attorns tenant to the mortgagee. The object of this clause is to give the mortgagee a power of distress as an additional security for payment of the mortgage debt and interest.

An attornment clause creates a real tenancy, even if the mortgagee has

not the legal estate (*Morton v. Woods*, 1869, L. R. 4 Q. B. 293). Thus, a mortgagor may attorn to a receiver appointed by the parties (*Jolly v. Arbuthnot*, 1859, 28 L. J. Ch. 547; 4 De G. & J. 224), or to a second mortgagee, even if he has already attorned tenant to the first mortgagee (*Ex parte Punnett, re Kitchen*, 1880, 16 Ch. D. 226). A tenancy from year to year, or from month to month, created by an attornment clause, is not cut down to a tenancy at will by a proviso enabling the mortgagee to determine the tenancy for the purpose of taking possession (*Ex parte Queen's Benefit Building Society, re Threlfall*, 1880, 16 Ch. D. 274; *Ex parte Voisey, re Knight*, 1882, 21 Ch. D. 442). A tenancy at will is determined at the death of the mortgagor, and the mere payment of interest on the mortgage by his heir-at-law is not evidence of a new tenancy between him and the mortgagee, (*Turner v. Barnes*, 1862, 31 L. J. Q. B. 170; *Scobie v. Collins*, 1894 [1895], 1 Q. B. 375).

Whether the attornment clause is followed by an express power of distress or not, the mortgagee is justified (apart from the provisions of the Bills of Sale Acts, *infra*) in distraining on the goods either of the mortgagor himself (*West v. Fritch*, 1848, 18 L. J. Ex. 50) or of strangers (*Pinhorn v. Souster*, 1853, 22 L. J. Ex. 266; *Jolly v. Arbuthnot*, *supra*; *Kearsley v. Philips*, 1883, 11 Q. B. D. 621). In this respect, a distinction exists between an attornment clause which creates a tenancy, and a mere conventional power of distress, which is good by way of contract or licence against the mortgagor himself, but does not justify seizure of the goods of a stranger (*Freeman v. Edwards*, 1848, 17 L. J. Ex. 258; *Kearsley v. Philips*, *supra*). The proceeds of a distress levied under an attornment clause are, in the absence of any provision to the contrary, applicable to the payment of principal as well as interest (*per James, L. J., In re Stockton Iron Furnace Co.*, 1879, 10 Ch. D. 335); and the fact that the rent reserved is equal to the interest, and is made payable on the same days, is not sufficient to displace the *prima facie* right (*Ex parte Harrison, re Betts*, 1881, 18 Ch. D. 127). The fact that the mortgagee is made a landlord under the attornment clause, does not cut down his rights as mortgagee in respect of trade fixtures annexed to the premises after the date of the mortgage (*In re Stockton Iron Furnace Co.*, *supra*; *Ex parte Punnett, re Kitchen*, *supra*).

It was held by Bacon, V. C., that an attornment clause does not make the mortgagee a mortgagee in possession as against subsequent incumbrancers, so as to be liable to them for rent which he might have received but for his wilful default (*Stanley v. Grundy*, 1883, 22 Ch. D. 478). But this case was decided in the face of several *dicta* to the contrary; and its authority has been somewhat shaken by a later *dictum* in very clear terms in a considered judgment of the Court of Appeal (*Green v. Marsh* [1892], 2 Q. B. 330). At all events, it does not make the mortgagee a mortgagee in possession as between him and the mortgagor (*per* Ld. Selborne, L. C., *Ex parte Harrison, re Betts*, *supra*).

By sec. 6 of the Bills of Sale Act, 1878, an attornment "whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress." The object of this enactment was to make an attornment clause, if unregistered, void against an execution creditor or a trustee in bankruptcy, etc., if the goods seized were

left in the possession or apparent possession of the mortgagor (see sec. 8 of the Act). It has, however, been held that attornment clauses are now within sec. 8 of the amending Bills of Sale Act of 1882, so that, if not registered, they are void even as between mortgagor and mortgagee (*Green v. Marsh* [1892], 2 Q. B. 330; for a criticism of this case, as regards the application of the Act of 1882, see Weir on *Bills of Sale*, pp. 246-248). But though an unregistered attornment clause is void under the Bills of Sale Acts, in so far as the power to seize personal chattels is concerned (*Ex parte Kennedy, re Willis*, 1888, 21 Q. B. D. 384; *Green v. Marsh, supra*), want of registration does not affect the relation of landlord and tenant created under it; in an action by the mortgagee to recover possession of the land from the mortgagor, the writ may be specially indorsed under Order 3, rule 6 (f), and final judgment may be applied for under Order 14 (*Mumford v. Collier*, 1890, 25 Q. B. D. 279).

A proviso to sec. 6 protects "any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent." It has been held that this proviso applies only to a *bond fide* lease by a mortgagee who has actually taken possession, and not to a case where the demise is created by the mortgage deed itself (*Ex parte Kennedy, re Willis, supra*), nor to a case where the mortgagee, not having taken possession, enters into an agreement with the mortgagor for a modification of the terms of the tenancy (*Green v. Marsh* [1892], 2 Q. B. 330).

[*Smith, Leading Cases*, 1896, i. 494-527; Woodfall on *Landlord and Tenant*; Foà on *Landlord and Tenant*; Coote on *Mortgages*; Fisher on *Mortgages*. For the old law, see Co. Lit. (1832 ed.) 309a-325a; Sheppard's *Touchstone*, by Preston, chap. xiii. vol. ii. 253-266.]

Attraction.—This was a doctrine set up by the defendants in the case of *Baker v. White*, 1875, L. R. 20 Eq. p. 166, on the authority of *Baker v. Parson*, 1873, 42 L. J. Ch. 228. In his judgment, however, Sir George Jessel, M. R., denied that any such doctrine existed. The facts of the case were as follows:—There was a devise of freeholds and copyholds in such terms that the devisee was held to take an equitable estate for life in the copyholds, and a legal estate for life, with a legal remainder to the heirs of his body, i.e. an estate tail in the freeholds. The defendants contended that the circumstance that the trustees of the will took the legal estate in the copyholds during the life of the devisee was an argument in favour of the trustee taking a legal estate also in the freeholds during his life. The argument was that the legal estate in the copyholds *attracted* the legal estate in the freeholds, by reason of the freeholds and copyholds being combined in one devise. The devisee claimed to be legal tenant in fee of both freeholds and copyholds, having executed a disentailing assurance shortly after the death of the testator. On a bill being filed for specific performance of a contract for sale, Sir George Jessel construed the will as stated above, and allowed a demurrer on the ground that the devisee took an equitable estate for life only in the copyholds; but he expressly held that the devisee had made a good title to the freeholds.

Auction, in Scotland called a *roup*, is, in its widest sense, a sale, however conducted, by which a person obliges himself to transfer property, or any interest therein, to the highest bidder, within the conditions of sale.

The property may be either real or personal; it may be sold as a whole or in lots; and the property of several owners is frequently offered for sale at one and the same auction.

Ordinarily, a description of the property—in the case of realty called particulars of sale, in the case of personalty a catalogue—and the conditions under which it will be sold (see *CONDITIONS OF SALE*; *PARTICULARS OF SALE*) are circulated in the sale-room, and the attention of those present called to them by the auctioneer when he puts up the property. The biddings proceed in order, each succeeding bid being higher than the preceding one, and the bidding being called by the auctioneer. The highest bidder is declared the purchaser, the acceptance of his offer being usually signified by the auctioneer striking his desk with his hammer.

To render the sale complete, the highest bidding must have been made by or on behalf of a person legally competent to contract (see *CONTRACT*), and accepted by the auctioneer, every bidding being but an offer on one side, which is binding on neither until assented to (*Payne v. Cave*, 1789, 3 T. R. 148; 1 R. R. 679; Sale of Goods Act, 1893, s. 58, subs. 2). Moreover, in a very large number of cases, there must, to make the contract enforceable, be a written memorandum of the same, signed by the party to be charged therewith, or his agent in that behalf (see *CONTRACT*; *AUCTIONEER*). On a sale in lots, there is a separate contract in respect of each lot sold (*Emmerson v. Heelis*, 1809, 2 Taun. 38; 11 R. R. 520; Sale of Goods Act, 1893, s. 58, subs. 1).

In the absence of express reservation of a right to bid, the employment of a puffer, or person appointed to bid on behalf of the seller, is sufficient to avoid the sale; but the seller may expressly notify—on a sale of land such notification must appear in the particulars or conditions—that the sale is to be subject to a reserved price, or to a reserved right to bid; in the former case, the auctioneer withdraws the property, if the price is not reached; and in the latter, the seller or any one person on his behalf may bid (*Green v. Baverstock*, 1863, 14 C. B. N. S. 204; Sale of Land by Auction Act, 1867, ss. 4–6; *Gilliatt v. Gilliatt*, 1869, L. R. 9 Eq. 60, as to land; Sale of Goods Act, 1893, s. 58, subss. 3, 4, as to goods). The reservation of “a right to bid once” precludes the making of more than one bid (*Parfitt v. Jepson*, 1877, 46 L. J. C. P. 529); and an announcement that the sale is to be “without reserve,” means that there will be no bidding by or on behalf of the seller, and that the property will be sold to the highest bidder (*Warlow v. Harrison*, 1859, 1 El. & El. 309; *Mainprice v. Westley*, 1865, 6 B. & S. 420). A purchase induced by fraudulent means—as at a *mock auction*, where confederates of the seller, pretending to be genuine bidders, run up worthless articles to fancy prices—or by intimidation, cannot, of course, be enforced. But a vendor is not responsible for sham biddings made without his knowledge, or that of the auctioneer (*Union Bank v. Munster*, 1887, 37 Ch. D. 51). On the other hand, there must be no unfairness on the part of bidders, and a vendor may refuse to complete the sale if the highest bidder has conspired or wilfully interfered, with a view to depreciating the property, and deterring others from bidding (*Fuller v. Abrahams*, 1821, 3 Brod. & B. 116; 23 R. R. 626). An agreement between two intending purchasers not to bid against each other is not, however, illegal (*Galton v. Emuss*, 1844, 1 Col. C. C. 243; *In re Carew's Estate*, 1858, 26 Beav. 187; *Heffer v. Martyn*, 1867, 36 L. J. Ch. 372); and so-called *knock-outs* are common, i.e., where persons agree that one of them only shall bid for any particular article, and, after the sale, put up privately

amongst themselves the goods that each has bought, dividing the difference between the price at which the goods were originally bought and that which was subsequently realised.

It is usual at auctions to require the payment of a deposit as a guarantee for the fulfilment of the contract, and also, if the contract is completed, as part payment of the purchase-money; the purchaser cannot elect to forfeit his deposit and avoid the contract (*Crutchley v. Jerningham*, 1817, 2 Mer. 502, 506). It is paid either to the auctioneer or to the vendor's solicitor, and, as a general rule, is received by the former as stakeholder, by the latter as agent of the vendor (*Edgell v. Day*, 1865, L. R. 1 C. P. 80).

An auction sale is a useful method of ascertaining the market value of property, and *prima facie* negatives the imputation of fraud (*Earl of Aldborough v. Trye*, 1840, 6 Madd. 460). It is commonly resorted to by trustees and on sales of estates under order of the Court, and there are certain statutory sales which must be made in this mode (see Bateman, *Law of Auctions*, 8). It is not, however, *per se*, a sale in market overt (*Lee v. Bayes*, 1856, 18 C. B. 599), nor will it, except under special circumstances, support a purchase by a person in a fiduciary position, *e.g.* a trustee or executor (*Benningfield v. Baxter*, 1886, 12 App. Cas. 167); mortgagee (*Martinson v. Clowes*, 1882, 21 Ch. D. 857); vendor's solicitor (*Ex parte Bennett*, 1805, 10 Ves. 380; 8 R. R. 1; *Parnell v. Tyler*, 1833, 2 L. J. Ch. 195; *Cutts v. Salmon*, 1852, 16 Jur. 623); or the auctioneer either for himself or a third party (*Oliver v. Court*, 1820, 8 Price, 127; 22 R. R. 720; *Baskett v. Cafe*, 1851, 4 De G. & Sm. 388; Sugden, *Vendors and Purchasers*, 690).

Besides the ordinary auction, there are others now practically obsolete, or only in local use. Of these the most important are *Dutch auctions*, so-called from their country of origin, and *sale by inch of candle*. In the former, there is but one bidding, the property being put up at a high price, which is gradually decreased until someone closes with the offer. In the latter, the biddings are kept open only for so long as a small piece of candle continues to burn, the lot being knocked down to whoever last bid before the light expired. It was prescribed for the sale of goods imported by the East India Co., and is occasionally resorted to in country districts in disposing of the rents of charitable property.

Apart from sales, leases and other interests in land are frequently let by auction.

Formerly there was a *pro rata* government duty imposed on auction sales, but this was abolished by 8 & 9 Vict. c. 15, s. 1.

[For treatises, see Babington, 1826; Bateman, 1895; Hart, 1895; Squibbs, 1891.]

Auctioneer.—Any person, of either sex, may act as an auctioneer if duly licensed under 8 & 9 Vict. c. 15, secs. 2 and 4 of which enact that, subject to certain exemptions (see Bateman, *Law of Auctions*, 16), everyone who carries on the business of an auctioneer, or offers property for sale by any mode of sale by competition, must, under a penalty of £100, be provided with an auctioneer's licence, upon which a duty of £10 is payable, and which is only valid for a year or part of a year, ending on the 5th of July. And by 6 Geo. IV. c. 81, s. 25, any person, not duly licensed, who has upon his premises words importing that he carries on the business of an auctioneer, is liable to a penalty of £20. The licence is strictly personal, but the holder may

pursue his calling upon as many different sets of premises as he chooses (*ibid.* ss. 7, 10), and he may act as appraiser or house agent without taking out an additional licence (46 Geo. III. c. 43, s. 7; 8 & 9 Vict. c. 76, s. 1; 24 & 25 Vict. c. 21, s. 13). It does not, however, enable him to trade from town to town (*Manson v. Hope*, 1862, 2 B. & S. 498. See *HAWKER*; *PEDLAR*); nor, except in certain cases, to sell excisable goods (27 & 28 Vict. c. 56, s. 14). Further revenue requirements are that an auctioneer must, during a sale, exhibit his full name and address in a conspicuous part of the sale-room, and be ready to produce his licence on demand by a revenue officer (8 & 9 Vict. c. 15, ss. 7, 8).

Although an auctioneer may sell his own property without disclosing that he is the owner, he generally acts as agent for another, and when so employed he is primarily the agent of the vendor. Apart from such cases as where he is specially employed merely to accept bids, his agency is a general one (*Howard v. Braithwaite*, 1812, 1 Ves. & Bea. 202, 210), and consequently—subject, as between him and the vendor, to his special instructions, and, as regards third persons, to their having notice of such instructions—authorises him to do all acts usually done by auctioneers (*Collen v. Gardner*, 1856, 21 Beav. 540, 542. See *PRINCIPAL AND AGENT*). There are certain special kinds of sales, where particular duties are imposed upon the auctioneer (see *Bateman, Law of Auctions*, ch. xvi.); but, generally speaking, he surveys, values, and lots the property; advises as to the amount of the reserved price, the rules of bidding, and the time and place of sale; issues advertisements; and prepares particulars and plans, or catalogues: but the draft particulars should be submitted to the solicitor, who, in the case of real estate, is also the proper person to draw the conditions. If the goods which he is commissioned to sell, being upon premises occupied by his principal, are threatened with a lawful distress for rent, and, in order to prevent the distress from being made *before sale*, he promises to pay the rent, his principal will be bound to hold him harmless upon such promise, if a reasonable one under the circumstances (see judgments in *Sweeting v. Turner*, 1871, L. R. 7 Q. B. 310). Goods sent to premises in the occupation of the auctioneer, for the purpose of being sold by him, are not distrainable while there (*Brown v. Arundell*, 1850, 10 C. B. 54).

An employment to sell by auction does not authorise a sale by private contract (*Daniel v. Adams*, 1764, Amb. 495; *In re Loft*, 1843, 8 Jur. 206; *Marsh v. Jelf*, 1862, 3 F. & F. 234; but see *Dart*, 73); and, unless his employer consent to his delegating his duty, an auctioneer must conduct the sale himself (*Coles v. Trecothick*, 1804, 9 Ves. 234, 251; 7 R. R. 167; *Henderson v. Barnewall*, 1827, 1 Y. & J. 387), though he may employ others to assist him in subsidiary matters (*Commonwealth v. Harnden*, 1837, 19 Pickering, 482). As a general rule, the particulars and conditions cannot be contradicted, varied, or added to at the sale by verbal declarations of the auctioneer (*Gunnis v. Erhart*, 1789, 1 H. Black. 290; 2 R. R. 769). If, therefore, any error in them has been discovered since their first publication, it is his duty to carefully rectify the same, and to see that only corrected copies are distributed. An auctioneer has no implied authority to warrant goods (*Payne v. Lord Leaconfield*, 1882, 51 L. J. Q. B. 642). Where the sale is without reserve, he must sell the property to the highest bidder (*Mainprice v. Westley*, 1865, 6 B. & S. 420), and refuse any bid made by or on behalf of the seller (see *AUCTION*). He should also refuse bids made by persons labouring under a legal incapacity to contract, or standing in a fiduciary relation to the property. Except under special circumstances, he cannot buy, either for himself or a third party, the property he is employed to sell

(*Oliver v. Court*, 1820, 8 Price, 127; 22 R. R. 720; *Baskett v. Cafe*, 1851, 4 De G. & Sm. 388; Sugden, V. & P. 690).

On the fall of the hammer, he becomes the implied agent of the highest bidder also, to write down his name as purchaser (*White v. Proctor*, 1811, 4 Taun. 209; 13 R. R. 580), and it is his duty to see that a binding contract is made. If the sale be of real estate, or of goods to the value of £10 or upwards, and there has in the latter case been no acceptance or receipt of part, and nothing given in earnest or part payment, he should write down the name of the purchaser of each lot, together with the price bid, against the description of the lot in the particulars or catalogue, taking care that the conditions (and plan, if any) are incorporated therewith or distinctly referred to (*Kenuworthy v. Schofield*, 1824, 2 Barn. & Cress. 945, 948). A mere entry in his sale-book is not sufficient, unless reference is clearly made therein to the particulars, or catalogue, and the conditions (*Peirce v. Corf*, 1874, L. R. 9 Q. B. 210; *Rishton v. Whatmore*, 1878, 8 Ch. D. 467). His clerk's authority is not so extensive, for, although the clerk can sign as agent for the seller (*Bird v. Boulter*, 1833, 4 Barn. & Adol. 443; *Dyas v. Stafford*, 1881, L. R. 7 Ir. 590; *Dart*, 209), he cannot so bind the purchaser without the latter's express assent (*Peirce v. Corf*, *supra*; *Nims v. Landray* [1894], 2 Ch. 318). The auctioneer's authority to sign for the purchaser is limited to the auction; when employed to sell by private contract, he is agent for the seller only (*Mews v. Carr*, 1856, 1 H. & N. 484).

At or immediately after the sale, the auctioneer ought to disclose the name of his employer, if he wishes to avoid future responsibility as principal. (See PRINCIPAL AND AGENT.)

On a sale of goods, the auctioneer has implied authority to receive the proceeds of sale (*Williams v. Millington*, 1788, 1 H. Bl. 81; 2 R. R. 724), but on a sale of land he has no power, without express authority, to receive more than the deposit (*Sykes v. Giles*, 1839, 5 M. & W. 645). He has no general authority to give credit, or to receive payment otherwise than in cash (*Williams v. Evans*, 1866, L. R. 1 Q. B. 352); where, however, payment by cheque is customary, he may accept payment in that mode, provided he use reasonable caution (*Farrer v. Lacey*, 1885, 31 Ch. D. 42); but until the cheque is cashed he should refuse to hand over to the purchaser any document of title, and, on a sale of goods, he should refuse delivery (*Papé v. Westacott* [1894], 1 Q. B. 272). If he receive the deposit expressly as agent for the vendor, he must pay it over to the latter on demand (*Edgell v. Day*, 1865, L. R. 1 C. P. 80); generally, he receives it as a stakeholder, in which case he should retain it until the contract is either carried into effect or rescinded, and the party entitled ascertained (*Harington v. Hoggart*, 1830, 1 Barn. & Adol. 577), and he may interplead, if in case of dispute either party threaten him with an action for the amount. (See INTERPLEADER.)

The auctioneer's right to sue and his liability to be sued upon the contract are, in general, the same as in the case of any other agent (see PRINCIPAL AND AGENT); but on a sale of goods he can bring an action for the price in his own name, though he contracted as agent only (*Robinson v. Rutter*, 1855, 4 El. & Bl. 954), unless he has himself signed the contract as agent for the buyer (*Farebrother v. Simmons*, 1822, 5 Barn. & Ald. 333; 24 R. R. 399).

This right to sue in the case of goods arises from his special property in the subject-matter, for, whether the sale be on the premises of the owner or in a public auction-room, he has a possession coupled with an interest in the goods, and he can maintain an action against anyone who wrongfully removes them out of his possession (*Williams v. Millington*, 1788, 1 H. Bl.

81, 85; 2 R. R. 724). It is his duty to take the same care of goods intrusted to him for sale as a prudent man would of his own (*Maltby v. Christie*, 1795, 1 Esp. 340; see BAILMENTS). He must also be ready to return to his principal any property that remains unsold, and to account to him for the proceeds of the sale (*Crosskey v. Mills*, 1834, 1 C. M. & R. 298). So long as the goods, or deposit, or purchase-money, are in his possession, he has a particular lien upon them for his commission and expenses (*Williams v. Millington*, *supra*; *Woolfe v. Horne*, 1877, 2 Q. B. D. 355; *Webb v. Smith*, 1885, 30 Ch. D. 192).

An auctioneer is generally remunerated by a commission on the amount realised, or, if no sale has been effected, on the reserved price, which may or may not include incidental expenses. In some cases, such as sales under distraints for rent or County Court process, his charges are regulated by statute; otherwise, they are subject to agreement between himself and his employer; in the absence of an agreement, he is entitled to a reasonable remuneration (*Eicke v. Meyer*, 1813, 3 Camp. N. P. 412; *Cohen v. Paget*, 1814, 4 Camp. N. P. 96; *Rainey v. Vernon*, 1840, 9 Car. & P. 559). His right to commission may, however, be forfeited if there has been negligence or irregularity on his part (*Deneu v. Daverell*, 1813, 3 Camp. N. P. 451; *Kirkman v. Booth*, 1848, 11 Beav. 273; *Furber v. Cobb*, 1887, 18 Q. B. D. 494). In the north of England, a custom largely prevails, on sales of realty, of paying the auctioneer by a fixed fee, for which he simply attends the auction-room to knock down the property, the general control of the proceedings being in the hands of the solicitor. And under the general order made in pursuance of the Solicitors' Remuneration Act, 1881 (see SOLICITOR), a scale of charges is fixed where the vendor's solicitor conducts or negotiates a sale of real property. This scale only applies where no remuneration has been paid by the client to the auctioneer for offering the property (*Burd v. Burd*, 1889, 40 Ch. D. 628; *Drielsma v. Manifold* [1894], 3 Ch. 100).

If an auctioneer receive into his possession goods to which his principal has no title, and, on selling them, delivers them to the purchaser, he is liable to the real owner for the conversion (*Cochrane v. Rymill*, 1879, 40 L. T. 744; *Barker v. Furlong* [1891], 2 Ch. 172; *Consolidated Co. v. Curtis* [1892], 1 Q. B. 495); and if, after having received the deposit or the purchase-money, he pays it over to his employer, after notice that the title of the latter was bad, he will be liable for the money (*Burrough v. Skinner*, 1770, 5 Burr. 2639; *Peto v. Blades*, 1814, 5 Taun. 657; 15 R. R. 609). He is not, however, liable to the true owner if he merely brought the vendor and purchaser together, and they completed the bargain without further intervention on his part (*National Mercantile Bank v. Rymill*, 1881, 44 L. T. 767; *Turner v. Hockey*, 1887, 56 L. J. Q. B. 301); nor if the goods are within the disposition of his principal within the Factors Act, 1889, and he acted in good faith and without notice of any claim by a third party. (See FACTOR.)

The Surveyors' Institution, incorporated by Royal Charter in 1881, and the Auctioneers' Institute, have been founded with a view to promoting by means of examination and otherwise, the efficiency of auctioneers and surveyors.

For bibliography, see AUCTION.

Audience, in diplomatic language, is an interview granted by the sovereign or chief authority of a State to foreign ambassadors, ministers, or other public envoys.

Audience, Right of.—The right of acting as advocates in Courts of law on behalf of parties to an action or criminal proceeding (see **ADVOCATE**; **ADVOCATES, COLLEGE OF**).—The exclusive right of barristers in the superior Courts, viz. the House of Lords, the Privy Council, the Court of Appeal, the High Court, the Assize Courts, the Central Criminal Court, is based upon ancient usage. In other cases the right of audience depends upon usage, statute, or the rules of procedure of the particular Court. Thus in *ex parte Evans*, 1846, 9 Ad. & E. 279, it was held that a Court of Quarter Sessions might make an order that barristers, provided as many as four were in attendance, should have exclusive audience, although solicitors had formerly performed the duties of advocates there; and this has become customary at Quarter Sessions.

In the Court of Bankruptcy, however, although it is now part of the Supreme Court, under the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 151, solicitors have a right of audience; and also in bankruptcy appeals from County Courts to Divisional Courts, as these are the High Court (Cave, J., in *ex parte Reynolds, in re Barnett*, 1885, 15 Q. B. D. 169). But not in appeals to the Court of Appeal which is not the High Court.

In the Mayor's Court of London, barristers alone are heard in open Court on the trial of issues of law or fact; though this Court is not a superior Court (*Mayor, etc., of London v. Cox*, 1867, L. R. 2 H. L. 239). On private Bills in Parliament solicitors are not heard before committees unless they are registered as agents for the petition (May, *Parliamentary Practice*, p. 773).

Counsel may not attend the Courts of Revising Barristers on behalf of any party (6 Vict. c. 18, s. 141).

In County Courts, both barristers and solicitors are entitled to appear; but the solicitor must be acting generally in the matter; and a managing clerk, although himself a solicitor, cannot appear in a matter for which his employers are retained (*R. v. Snagge* [1894], 2 Q. B. 440).

Auditor.—An auditor may be described as a person whose duty it is to examine the accounts of a company, firm, or person, so as to ascertain the exact state of affairs financially at a given moment. This involves not only a scrutiny of the figures, but also an examination of the form and substance of the accounts, in order to see that they truly represent the state of affairs purporting to be represented by them. The position of an auditor, his rights and liabilities, depend very much upon the circumstances under which, and upon the purposes for which, he is appointed. Auditors may be divided into two classes, official and private auditors; the former are officers connected with, or appointed by, some government department; the latter are professional men or amateurs, selected by the parties interested in the work to be done. Private auditors, again, may be divided into two classes, the one consisting of those who are appointed by private individuals, under no statutory or other legal obligation to appoint auditors; the other consisting of auditors, unconnected with any official department, but appointed by those interested, in compliance with law. The duties of the former class of private auditors depend on the instructions given and the agreement made (tacitly or expressly) at the time of the appointment; the duties of the latter class are modified by the statutes which require the appointment of the auditor.

An auditor may be required to audit accounts on behalf of traders who desire to find out their true financial position, or who desire some

check upon their accountancy department; he may be employed to report on the accounts with a view to the conversion of a business into a joint-stock company; he may be desired by a committee of shareholders to investigate and make a special report on the company's affairs. In all these and similar cases, his duty and his rights must depend upon the contract entered into by him with the parties who engage him. All auditors (omitting governmental auditors, who often stand in a peculiar position) are bound to exercise such skill, care, and caution as a reasonably competent, careful, and cautious auditor would use (*per* Lopes, L. J., *In re Kingston Cotton Mills Co.*, No. 2 [1896], 2 Ch. 288). An auditor must be honest, he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that which he certifies to be true (*In re London and General Bank* [1895], 2 Ch. 683). What is reasonable care, and what is ordinary competency, are matters of fact (*ibid.*, at p. 683). It may be suggested, that if a man employs a carpenter to audit complicated partnership accounts, he may not complain if the audit is not conducted with the skill of a member of the Institute of Chartered Accountants. But if the auditor be a professional accountant, the fact that he has not the skill requisite would be no answer to proceedings for negligence, if the standard of the work done falls short of that which would be reached by a professional auditor, properly equipped and prepared for his business.

The liability even of a professional auditor does not arise unless he has been negligent. He must not be taken to guarantee the discovery of all fraud (*In re Kingston Cotton Mills Co.*, No. 2 [1896], 2 Ch. 289); for, as Lindley, L. J., pointed out, an auditor is not an insurer; he is bound to take reasonable care, and if he does so he is not responsible for undiscovered fraud (*In re London and General Bank* [1895], 2 Ch. 683). In respect of his duties, the professional auditor is in the same position as a member of any other profession; if a man holds himself out as an expert, he must at his peril come up to the standard of competence which the average man of his class habitually reaches; if he does this, he is liable only for actual negligence, but not for mere mistakes, nor for mere errors of judgment. Moreover, it is submitted that, though negligent, the auditor is, apart from statutory provision, liable only to those who employ him (*Le Lievre v. Gould* [1893], 1 Q. B. 491).

[See *Purves v. Landell* (1845, 12 Cl. & Fin. 91), a case relating to a solicitor, and see Beven on *Negligence*, p. 1426 *et seq.*]

When an auditor is appointed, in pursuance of the requirements of a statute, his duties will often be prescribed by the statute itself, and may by it be increased or modified. The following are the more important examples:—

1. *Public Companies.*—(a) Under the Companies' Clauses Act, 1845, 8 Vict. c. 16, ss. 101–118, auditors must be appointed by the company from amongst the shareholders who hold no office in the company, and the auditors, having duly received the periodical accounts and balance-sheet, must examine the same and report thereon. The auditors may employ accountants or other persons at the expense of the company, and one auditor may do this, though the other dissents (*Steele v. Sutton Gas Co.*, 1883, 12 Q. B. D. 68).

(b) *Companies Acts, 1862–1893.*—It is very remarkable that, under these Acts, the appointment of auditors is not necessary. It is true that Table A, clauses 83 to 94, deals with auditors and their duties, but Table A is not compulsory. In practice, however, its provisions on this point are often adopted, with slight modification. It is usual to provide that the auditors

shall make a report to the members on the balance-sheet and accounts, and in every such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet, containing the particulars required by the articles of association, and properly drawn, so as to exhibit a true account of the company's affairs as shown by the books of the company. The auditor is often required to sign the balance-sheet. These provisions, though usual, are in most cases optional; but if the company be a banking company, the Companies Act, 1879, 42 & 43 Vict. c. 76, s. 7, makes them compulsory. The duties of auditors of banking companies, and of all companies, when the articles of association contain provisions such as these just quoted, are fairly well settled, and may be summarised thus:—(1) The auditor must not confine himself merely to the task of verifying the arithmetical accuracy of the balance-sheet, but must inquire into its substantial accuracy, and ascertain that it contains the particulars specified in the articles of association—the provisions of which he is bound to know—and is properly drawn up, so as to contain a true and correct account of the state of the company's affairs (*Leeds Estate Building and Investment Co. v. Shepherd* [1895], 36 Ch. D. 787). (2) The auditor must ascertain the true financial position of the company by an examination of the books, and must take reasonable care to see that the books themselves show the company's true position; he should check the balance-sheet against the books, and examine it with the vouchers, and make a report to the shareholders (*In re Kingston Cotton Mills, No. 1* [1896], 1 Ch. 6; *In re London and General Bank* [1895], 2 Ch. pp. 682–3). (3) An auditor is not bound to be suspicious, and he is perfectly justified in acting on the opinion of experts whose special knowledge enables them to assist him; he may believe tried servants in whom the company placed confidence. But if anything occurs to arouse his suspicion, he must probe the matter to the bottom, and he must use reasonable care not to allow himself to be deceived (*In re Kingston Cotton Mills, No. 2* [1896], 2 Ch. pp. 284, 288). Moreover, an auditor should not rely to any considerable extent on conversations with the directors; he must examine the books, vouchers, and commercial documents for himself (*In re New Oriental Bank Corporation, Times*, 17th Dec. 1892). (4) The auditor must report to the shareholders anything of a serious nature; e.g. he does not fulfil his duty if he merely points out to the directors that the dividend about to be declared has not been earned; he must take care to bring this information to the shareholders; and giving means of information is not the same thing as giving information (*In re London and General Bank* [1895], 2 Ch. 685). (5) It is no part of an auditor's duty to take stock, and an auditor may rely upon false stock certificates, produced by the proper persons, provided that the falsity would not be discovered by an ordinarily careful auditor (*In re Kingston Cotton Mills, No. 2, supra*). (6) In one case (*Spackman v. Evans*, 1868, L. R. 3 H. L. 171), Lord Chelmsford said, that it is no part of the auditor's duty to inquire into the validity of any transactions appearing in the account; but this is hardly in accord with the modern views, nor in practice do auditors act upon this view of the law. But the auditor fulfils his functions if he reviews the accounts, and reports to the members; he is not expected, nor allowed, to manage the business, nor is it even his duty to give advice as to this (*In re London and General Bank, supra*). Auditors often advise as to the form of accounts they think best, and this is within their functions.

If the auditor of a company neglects his duties, he is liable to an action for negligence, and may be cast in such damages as are the direct result of his neglect (*Leeds Building and Investment Co. v. Shepherd*, 1887, 36 Ch. D. 787).

Can he be proceeded against under sec. 10 of the Companies Winding-up Act, 1890? Of course, until the company is in liquidation, he cannot; but in two cases, in which the company was being wound up, auditors have been attacked under this section. *In re London and General Bank* [1895], 2 Ch. 161, the Act of 1879, *supra*, applied, but in the subsequent case (*In re Kingston Cotton Mills, No. 1* [1896], 1 Ch. 6), the company whose affairs were under consideration was not a banking company. In both cases the Court of Appeal decided that where an officer commits a breach of duty to the company, the direct consequence of which has been a misappropriation of assets for which he could be held responsible in a civil action, such breach of duty is a misfeasance within sec. 10 of the Winding-up Act, 1890. It was also decided that the auditor was in each case an "officer" within the meaning of the section, but the Court of Appeal laid down no rule of general application on this point. It is unfortunately still doubtful whether an auditor is an officer within the section, for an appeal on this point to the House of Lords in the *Kingston* case was abandoned, owing to the success of the auditor in proving that he had not been negligent. An auditor who is negligent cannot be sued after the lapse of six years from the time when the cause of action first arose (*Leeds Building and Investment Co. v. Shepherd*, 1887, 36 Ch. D. 787).

2. *Building Societies*.—In a registered society, the rules must provide for the appointment of auditors (37 & 38 Vict. c. 42, s. 15); and the Act of 1894, 57 & 58 Vict. c. 47, provides that the auditor shall certify that the statutory annual account is correct, duly vouched, and in accordance with law, or shall specially report to the society in what respect he finds it otherwise; further, he must certify that he has actually inspected the mortgage deeds and other securities belonging to the society, and must state the number of properties with respect to which deeds have been produced to and actually inspected by him. One at least of the auditors must be a person who publicly carries on the business of an accountant (57 & 58 Vict. c. 47). See ACCOUNTANT.

3. *Friendly and Industrial Societies*.—The Industrial Societies Act, 1893, 56 & 57 Vict. c. 39, s. 13, and the Friendly Societies Act, 1896, 59 & 60 Vict. c. 25, s. 26, provide that the accounts of the society must be submitted to certain public auditors appointed by the Treasury, or to two or more persons appointed as the rules provide. In either case the auditors must verify the annual return with the accounts and vouchers, and shall either sign the return as found by them to be correct, duly vouched and in accordance with law, or must specially report to the society or branch wherein it fails.

Miscellaneous.—There are numerous statutes which contain clauses dealing with the auditing of the accounts of matters to which the statutes relate. These it would be impossible within due limits to set out. Reference may be made to the following statutes and sections where the more important of them may be found: Public Health Act, 1875, 38 & 39 Vict. c. 55, ss. 246, 247; Municipal Corporation Act, 1882, 45 & 46 Vict. c. 50, ss. 25, 27; Sheriffs Act, 1887, 50 & 51 Vict. c. 55, ss. 21, 22; Local Government Acts, 1888 & 1894, 51 & 52 Vict. c. 41, ss. 27 (2), 71–73; 57 & 58 Vict. c. 73, s. 58; Elementary Education Acts, 1870 & 1873, 33 & 34 Vict. c. 86, ss. 17, 18; 36 & 37 Vict. c. 75, s. 60; Lunacy Act, 1890, 53 & 54 Vict. c. 5, ss. 234, 279; Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, s. 80; District Auditors Act, 1879, 42 & 43 Vict. c. 6, ss. 2–6; Oxford and Cambridge Universities Act, 1877, 40 & 41 Vict. c. 48, s. 11; Metropolitan Water Act, 1871, 34 & 35 Vict. c. 113, ss. 38, 40, 41, 42; Railway Com-

panies Acts, 1867, 30 & 31 Vict. c. 127, s. 30; 31 & 32 Vict. c. 119, ss. 11 & 12.

The remuneration of auditors is a matter of arrangement, and the ordinary rules governing other contracts of employment govern this question. The provisions of the articles of association of a company as to remuneration will, in the absence of special arrangement, be binding on the auditors.

[For information on the practical details of auditing, see Pixley on *Auditors* and Dicksee on *Auditing*.]

Augmentation (of Benefices).—See ADVOWSON; BENEFICE.

Auricular Confession.—See CONFESSION.

Australasia, a quarter of the world including Australia, Tasmania, New Zealand, New Guinea, and various groups of islands in the Pacific Ocean. By Act of Parliament, passed in 1885, power was given to create a Federal Council; each Crown colony to have one representative, and each self-governing colony two. The Act was not to come into operation until the legislatures of four colonies had passed Acts or Ordinances for the purpose. Acts were passed by New South Wales, Victoria, South Australia, and Tasmania in 1895–96. (See the *Journal of the Society of Comparative Legislation*, Aug. 1896.) See also separate headings and PRIVY COUNCIL for conditions of appeal from the several colonies.

Australia, an island continent forming part of Australasia, now entirely occupied or controlled by Great Britain. It includes the colonies of New South Wales, Victoria, Western Australia, and Queensland, and the province of South Australia. All these have received responsible government. The laws administered in the Australian colonies are English in their origin, except in so far as native customs are allowed to subsist. See PRIVY COUNCIL as to conditions of appeal.

Author.—English law gives no definition of an author; it would indeed be difficult to fix on any form of words to include operations so diverse as those of the poet, the law reporter, the compiler of a post-office directory, and the photographer, all of whom—and many others—have established their legal title to the name. “One who by his own intellectual labour, applied to the materials of his composition, produces an arrangement or compilation new in itself,” the definition by an American judge in *Atwill v. Ferrett*, 1840, 2 Blatch. 46, is fairly comprehensive for copyright purposes, although, naturally, it does not include that rendered necessary by the Artistic Copyright Act, 25 & 26 Vict. c. 68. (See COPYRIGHT.)

In his relations with the publisher the author is subject to the ordinary law of contract. If he contracts to write a book or an article, he must produce one of the quality agreed upon, but the contract is a personal one, and will not form the ground of an action for specific performance (*Clark v. Price*, 1819, 2 Wils. Ch. 157; 18 R. R. 159).

If a series of articles is ordered by a publisher, and the periodical

ceases to appear before the series is complete, the author may sue for work done on a *quantum meruit*, without completing delivery (*Planché v. Colburn*, 1831, 5 Car. & P. 58). The law takes no direct cognisance of literary merit, but if an author writes a book, to appear under his own name, the publisher may not issue another edition so altered as to contain errors and mistakes calculated to injure the writer's reputation as an author (*Archbold v. Sweet*, 1832, 5 Car. & P. 219); Lord Tenterden, C. J., explained in this case that the principle involved was analogous to that in the cases of "perfumers and fish-sauce makers."

In actions of libel, modern law, in the case of printed matter, takes little or no cognisance of the author. Publication is the ground of action, and the publisher cannot throw back his responsibility on the writer. The name of the author is immaterial, and the Court will not compel the publisher to disclose it (*Hennessey v. Wright*, No. 2, 1888, 36 W. R. 879; *Gibson v. Evans*, 1889, 23 Q. B. D. 384). (See DEFAMATION.) Nor, it would appear, can a publisher recover from an author who has involved him in damages for libel; but if the author has given the publisher an indemnity, in the case of a publication not in itself obviously illegal, the publisher can probably recover (see a discussion of this point by Lord Lyndhurst and Baron Alderson in *Colburn v. Patmore*, 1834, 1 C. M. & R. 73). As to Assignment, see *Hole v. Bradbury*, 1879, 12 Ch. D. 836; *Griffith v. Tower Publishing Co.* [1897], 1 Ch. 21.

Authorised Improvements.—The expression is used to describe the improvements which a tenant for life is authorised by statute to make on his estate. The subject will be treated under the heads SETTLEMENT; TENANT FOR LIFE (which see).

Authorising and Empowering.—See TRUST; PRECATORY TRUST.

Authority, False Representations as to.—See MISREPRESENTATION; PRINCIPAL AND AGENT.

Authority, Joinder without.—See PARTIES.

Authority, Military, Abuse of.—See ARMY; COURTS-MARTIAL.

Auto-Motor Cars.—See LIGHT LOCOMOTIVES.

Autre vie.—See ESTATES FOR LIFE.

Autrefols Acquit, Autrefols Convict.—A person who has once been lawfully acquitted or convicted of any offence cannot be re-tried for the offence. Even if circumstances of aggravation are alleged on the

second trial, or serious consequences to the victim of the offence have followed on the previous trial, a man must not be put twice in peril for the same offence (*Hawk.*, P. C., bk. ii. c. 36). It is immaterial where the first conviction or acquittal was, and whether it took place within or without the Queen's dominions or was in a foreign country, or was summary or on indictment (*R. v. Miles*, 1890, 24 Q. B. D. 423, and *R. v. Roche*, 1775, and 1 Leach, 125), provided that the Court of trial was of competent jurisdiction, and the indictment or accusation was sufficient in law to sustain a conviction for the offence charged on the second trial, and if erroneous was not reversed or set aside by writ of error or otherwise (*R. v. Drury*, 1849, 18 L. J. M. C. 189). It is also immaterial whether the prosecution is on the same statute or for the same common-law offence, so long as the facts constituting the offence are substantially the same (Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 33; *Wemyss v. Hopkins*, 1875, L. R. 10 Q. B. 378). The defence is raised by plea in bar of autrefois acquit or autrefois convict. If successful, it effectually stops the prosecution. If it fails in cases of misdemeanour, judgment for the Crown is entered on the indictment. In treason or felony, the defendant failing on the plea of autrefois acquit or convict is allowed to plead not guilty.

These pleas may be pleaded orally by the accused saying, when arraigned, that he has been lawfully acquitted or convicted of the offence charged (14 & 15 Vict. c. 100, s. 28). But a formal plea in parchment, signed by counsel, may be put in. As to the present form, see *R. v. Connell*, 1853, 6 Cox C. C. 178; *Arch. Cr. Pl.*, 21st ed., 150). It is now usual to combine with these pleas a plea of not guilty (*R. v. Drury*, 1849, 18 L. J. M. C. 189). A jury is sworn to try separately the issue raised by the plea of autrefois acquit or convict, and the burden of proof is on the defendant (*R. v. Roche*, 1775, 1 Leach, 125). Proof of the previous conviction or acquittal is made by production (1) of the record of the former trial; (2) of a certificate thereof, made under 14 & 15 Vict. c. 99, s. 13; or (3) in the case of summary convictions or acquittals, of a certificate by the clerk of the peace of the county or borough where the previous trial took place, if they have been returned into his office, otherwise by a certificate of the clerk to the Petty Sessional Court, or justices making the conviction (42 & 43 Vict. c. 49, s. 27 (3); *R. v. Miles*, 1890, 24 Q. B. D. 423).

The accused must also be identified with the person previously tried. The previous conviction or acquittal is insufficient to sustain the plea in the following cases:—(1) Where the accused was not in jeopardy on the former charge, *i.e.* where it would not have supported a legal conviction for the offence charged on the second trial; (2) Where the subsequent charge is of murder, manslaughter, or rape, following upon a previous trial for assault or arson (*R. v. Morris*, 1867, L. R. 1 C. C. R. 90; *R. v. Miles*, 1890, 24 Q. B. D. 423, at 433; *R. v. Serné*, 1887, 107 Cent. Crim. Ct. Sess. Papers, 418; (3) In cases of assault, where the accused, if convicted or sentenced to fine or imprisonment, has not paid the fine or undergone the punishment (24 & 25 Vict. c. 100, s. 45; *Hartley v. Hindmarsh*, 1866, L. R. 1 C. P. 553. Hereon see also *Arch. Cr. Pl.*, 21st ed., 148–155; *Hawk.*, P. C., bk. ii. cc. 35, 36, ss. 10–17; Mayne, *Criminal Law of India*, 1896, 905–911; and *Russ. on Crimes*, 6th ed., 38).

Autrefois Attaint.—A plea in bar now obsolete, owing to the abolition of attainder by the Forfeiture Act, 1870, 33 & 34 Vict. c. 23, s. 1, except perhaps in cases of outlawry, itself virtually obsolete. Since 1826,

it could be pleaded only where the attainder was for the same offence as that charged in the indictment (7 & 8 Geo. IV. c. 28, s. 4; see *Fost.*, 2nd ed., 41-44, 110-113; *Arch. Cr. Pl.*, 21st ed., 155; 3 *Co. Inst.* 213).

Autrefois Convict.—See AUTREFOIS ACQUIT.

Auxiliary Forces.—See ARMY.

Aval.—See BILLS OF EXCHANGE.

Average.—The meaning and origin of the word average are doubtful. It has been variously derived—from the Latin *aversio* (throwing overboard), from the Italian *avere* (property) or *varea* (contribution), and again from the German *haferei* (sea damage), and seems to have come to us through the French *avarie*. The following definitions have been given of it:—"In a marine sense, average and contribution are synonymous terms." "Average signifies the contribution to a general loss" (Park, 201). "Average is a term used in commerce to signify a contribution made by ship freight and goods on board a ship, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo, in order that the particular sufferer may not in the end be a greater loser than the rest of the persons interested in the ship and goods on board. Average, then, understood in this sense, is called general or gross average, because it falls upon the whole or gross amount of the ship freight and cargo, and also to distinguish it from what is often though improperly termed particular average, but which in truth means a particular or partial, and not a general loss, and has no affinity to average, properly so called" (Shee's *Marshall*, 424). General and particular average are distinguished in the *Guidon de la Mer* of 1580, and the Ordonnance of Louis XIV. of 1681. "The general contribution that is to be made by all parties towards a loss sustained by one for the benefit of all, is sometimes called by the name of *general average*, to distinguish it from *special* or *particular average*—a very incorrect expression used to denote every kind of partial loss happening either to ship or cargo from any cause whatever, and sometimes by the name of *gross average*, to distinguish it from *customary average* mentioned in bills of lading, which latter species is also sometimes called *petty average*" (Abbott, 625; see Lord Stowell, in *The Copenhagen*, 1799, 1 Rob. C. 289). If, however, average means loss (*aversio*), the use of the words *general* and *particular* in connection with it is necessary to show the incidence of the loss, which will depend on whether it be incurred for a *general* or *particular* benefit.

General Average.—This phrase is used to denote either the act which voluntarily causes the loss, or the loss consequent on that voluntary act, or the contribution levied on the whole adventure, in order to put the loser on the same footing as his co-adventurers (Arn. 845). For purposes of arrangement, the whole subject may be considered under the following heads:—1. The origin and basis of the principle of general average; 2. The essentials of a general average act; 3. The two kinds of general average losses, namely, sacrifices and expenditures; 4. Contribution to general average losses, and its exceptions; 5. What contributes to general

average; 6. The principle and amount of contribution; 7. The apportionment or adjustment of the contribution; 8. The adjustment of general average; 9. Its relation to insurance.

1. *Origin and Basis of the Principle.*—The principle is derived from the Rhodian law (*Lege Rhodiā cavetur ut si levandæ navis gratia jactus mercium factus sit omnium contributione sarciatur quod pro omnibus datum est: Digest, xiv. 2*), by which it was apparently applied only to a case of jettison, or throwing goods overboard. It was extended by the Roman law to all cases of sacrifice (*Digest, xiv. 2*), became embodied in the general maritime law (*e.g.* the laws of Oleron), and was thence incorporated into English law. What is the basis of the obligation so imposed on the parties to a marine adventure is not clearly established. Some authorities base it upon an implied contract between those interested in the adventure to mutually indemnify each other (Lord Bramwell, *Wright v. Marwood*, 1881, 7 Q. B. D. 62); and perhaps, as between a shipper of goods and a shipowner, such a contract may be implied (Lord Blackburn, *Anderson v. Ocean Steamship Co.*, 1884, 10 App. Cas. 107); but as between one shipper and another, there seems to be no such relation apart from express contract. The more favoured view is that the mere fact of shipment of goods subjects the shipper to this general maritime liability, by which he undertakes implicitly to indemnify his co-shippers as well as the shipowner. "The obligation to contribute depends not so much on the terms of any particular instrument, as on the general rule of maritime law" (Lord Tenterden in *Simmonds v. White*, 1824, 2 Barn & Cress. 805) "The liability to contribute does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute for the loss of property which is sacrificed by one in order that the whole adventure may be saved" (Lord Esher in *Burton v. English*, 1884, 12 Q. B. D. 218). "The principle upon which contribution becomes due does not appear to differ from that upon which claims for recompense for salvage services are founded. In jettison the rights of those entitled to contribution have their origin in the fact of a common danger, which threatens to destroy them all; and those rights and obligations are mutually perfected wherever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby saved" (Lord Watson in *Strang, Steel & Co. v. Scott*, 1889, 14 App. Cas. 608). The chief effect of adopting this view is, that it will require express words in the contract under which goods are shipped, to exclude the rule of general average contribution: thus, under a charter-party exempting the shipowner from liability for any act, neglect, or default whatsoever of their servants during the voyage, it was held that the shipowner could recover a general average contribution from the shippers, that the loss necessitating that general average was due to the negligence of the shipowner's servants, on the ground that the conditions ordinarily existing between shipper and shipowner had been varied by the contract (*The Carron Park*, 1890, 15 P. D. 203).

2. *Characteristics of General Average Acts.*—The master or the person who is in charge of the whole adventure decides whether a loss is to be incurred; and only an act done by the master or person in charge of the ship, or with his sanction and authority, and not by a stranger to the ship, can be general average. But if he authorises the act of that stranger, it is general average; *e.g.*, if a vessel is on fire in a port full of shipping, and is scuttled by the port authority (who has been sent for by the master) for

the general safety of the shipping, this being the best thing to do for the general interest of the ship, with the consent of the master, it is a general average act (*Papayanni v. Grampian Steam Ship Co., The Birkhall*, 1896, 12 T. L. R. 540); and the American law is the same (*Ralli v. Troup*, 1894, 157 U. S. R.). So jettison by a prize crew after the ship had been captured, with the approbation and under the direction of the original mate of the vessel, has been held to be general average (*Price v. Noble*, 1811, 4 Taun. 123; 13 R. R. 566). The following conditions are essential to make a loss general average:—(a) It must be an intentional act of man as distinguished from the force of the elements, *e.g.*, if a ship thrown on her beam-ends in a storm is righted by cutting away masts, or throwing cargo overboard, it is a general average loss, while, if she rights herself, owing to the mast snapping or the cargo washing overboard, it is a particular average loss, to be borne by ship and cargo respectively; (b) It must be of an extraordinary and an unusual nature, outside the scope of the shipmaster's usual duties; (c) It must be for the good of the common adventure, and not for that of a single interest only; (d) It must be to avert a loss of the whole adventure; (e) It must be done under circumstances which admit of no alternative, or, in other words, the danger must be imminent. But it is not necessary that the act, in order to be general average, should be successful *i.e.* that it should be the actual cause of the safety of the whole adventure, although some of the adventure must be ultimately saved in the case of a general average sacrifice, or there will be no interests to make contribution (Carver, 372; Lowndes, 19). If the ship perish by the very peril to avert which the act was done, it seems that any cargo that is saved will nevertheless contribute to the sacrifice; and if the ship survive that peril, but is eventually wrecked before the end of her voyage, all that is saved from the wreck contributes to the sacrifice (Phillips, 1354). English adjusters disregard the success of the general average act altogether (Arn. 896–8). The object of a general average act in England is the immediate safety of the adventure, and not the ultimate, as on the Continent and in the United States.

3. *General Average Losses*.—There are two kinds of general average loss, *sacrifice and expenditure*: the former is any actual damage suffered by one interest for the common safety; the latter is any actual outlay incurred for the same object: and the important distinction between the two is, that the former is only contributed for if the rest of the adventure arrives in safety, while the latter is independent of the event of the voyage. The classical definition of general average loss is that given by Lawrence, J. (*Birkley v. Presgrave*, 1801, 1 East, 220; 6 R. R. 256, described by the present Master of the Rolls as “one of the many happy expositions of mercantile law made by that learned person, in terms so broad and yet so accurate as show that he was one of the greatest mercantile lawyers in this country”): “All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, come within general average, and must be borne proportionally by all who are interested.” Lord Esher (*Svendsen v. Wallace*, 1884, 13 Q. B. D. 69) says that all such phrases as “the benefit of the whole adventure,” or “of the whole concern,” or “the common adventure,” must be restrained to the meaning of the words used by Lawrence, J.; and Bowen, L. J., in the same case, distinguishes between the criteria of a common commercial adventure and that of common safety from the sea, and says the latter is the English doctrine (p. 86).

Sacrifices.—First, as regards *ship*. The general rule is that if the ship, or any part of her equipment, is destroyed, damaged, or lost for the general safety, or is applied to some use different from its ordinary use, the loss thence arising is general average, *e.g.* cables cut or anchors slipped to avoid being driven on shore in a gale, or sails let go, or masts cut to right a vessel on her beam-ends (Arn. 866, 8); a ship scuttled, in order to put out a fire on board (*Stewart v. West Indies and Pacific S. S. Co.*, 1873, L. R. 8 Q. B. 362), whether the fire be due to spontaneous combustion of cargo or not (Arn. 870). On the other hand, it is not a general average loss, if a sacrifice is made in order to avert a peril contemplated by the voyage, and thus within the scope of the shipowner's duties, *e.g.*, if in war time the ship fights an enemy's ship, no contribution is made for the expense of curing the wounded, or repairing the damage done by the enemy's fire, or replacing the ammunition expended in the defence of the adventure (*Taylor v. Curtis*, 1816, 6 Taun. 608; 16 R. R. 686); or if the ship is strained, owing to carrying a press of sail in order to escape an enemy or a leakage (*Covington v. Roberts*, 1806, Bos. & P. N. R. 378; 9 R. R. 669). Where a ship is voluntarily stranded in order to avoid capture, sinking, or shipwreck, it is doubtful if this is a general average loss or not. According to the older writers, whose opinion is adopted in the American law, this is a general average loss, whether the ship is afterwards saved or not (*Columbian I. C. v. Ashby*, 1839, 13 Peters, S. C. 331). Abbott (5th ed., 349), Arnould (784, 3rd ed.), both adopt this view, and Carver (388) thinks it likely that it would be so held here. On the other hand, average adjusters here do not allow it, and Maclachlan upholds their practice (Arn. 873); but Lowndes agrees with the older authorities (4th ed., 138, quoted in Carver, 387), and the balance of opinion is thus in favour of admitting it. The question becomes more difficult when a ship is stranded by the voluntary act of the master when she is in a desperate extremity, for if it be inevitable that she must go ashore sooner or later, it seems that it is not a voluntary or a substantial sacrifice to put her ashore at one place instead of another. The American Courts, equally in this case, hold it to be a general average if it be "an intentional stranding, which is under the particular circumstances the direct result of voluntary agency rather than of the action of the elements, and the actual stranding is another than the one impending, and not merely an incidental and inconsiderable modification of it" (Phillips, 1313; Carver, 389; Arn. 872). Carver thinks it probable that "losses by stranding would be held here to be general average, where they are really due to a voluntary act, although done in a hopeless extremity, and that the rule would be the same whether the ship were saved or not" (388). Lowndes will not allow it to be a general average loss "where the stranding only anticipates an inevitable grounding in some place" (64). The necessity for the sacrifice being substantial (which is perhaps only another way of saying it must be voluntary), is perhaps best illustrated in the case of wreck, whether it be mast, spars, or sails, or cargo, cumbering the ship, and cut or cast away, because it hinders her navigation and endangers the common safety. If such wreck be actual, *i.e.* is in such a state that it must certainly be lost, although the rest of the adventure should be saved without cutting it away, cutting or casting it away, because it is endangering the whole adventure, is not a general average sacrifice. While, if it is only contingent wreck, and it may be saved, and therefore is of some value, although it is in a peculiarly dangerous position, and actually is a danger to the whole adventure, it will then be

a general average loss (Brett, L. J., *Shepherd v. Kottgen*, 1877, 2 C. P. D. 578; and *Corry v. Coulthard*, *ibid.*, where it was a question of a fallen mast; *Johnson v. Chapman*, 1865, 35 L. J. C. P. 23, where a deck-load of timber had got loose in a storm). In this case the thing sacrificed is exposed to a peculiar peril; but if the peril is not peculiar, but is common to the whole adventure, even though the only possibility of safety for the whole adventure lies in sacrificing that one part of it, that will still be a general average. It has been argued in such a case, that as that part must infallibly be lost, it is valueless and is no real sacrifice (Benecke, 170, 183, 219), but the answer to this seems to be that the fact of the common danger menacing the whole adventure, puts an equal value on all the interests in it, and it is no reason for the owner of the sacrificed interest suffering alone, that only its sacrifice will save the rest of the adventure (see Carver, 367-71).

The second kind of general average sacrifice of ship or her equipment, is where it, or any part of it, is put to some extraordinary and more hazardous use, *e.g.* extraordinary consumption of coal by the ship's engines being worked ahead and astern for a considerable time, in order to get her off a mud-bank (*The Bona* [1895], Prob. 125); spars cut up to make fuel for the donkey-engine of a sailing-ship, worked to keep down a leak, the ship having been sufficiently provided in that respect when she sailed (*Harrison v. Bank of Australasia*, 1872, L. R. 7 Ex. 39); but if a ship started on the voyage without a reasonably sufficient supply, the shipowner cannot recover in general for the value of the substitutes he has employed (*Robinson v. Price*, 1876, 2 Q. B. D. 91); sails or cordage used to stop a leak (Phillips, 1299); cutting the cable of the best bower anchor, and making it fast to a pier to prevent the ship being thrown off by a storm and sunk at the harbour bar (*Birkley v. Presgrave*, 1801, 1 East, 220; 6 R. R. 256); or cutting the ship's side open, to facilitate jettison of the cargo (*Marsham v. Dutrey*, Marshall, 430).

Secondly, in the case of goods. Sacrifice of goods generally takes the form of *jettison*. Any jettison of goods for the safety of the whole adventure is a general average, except perhaps in the case of deck goods (see below), even of goods for which no bill of lading has been given (Arn. 862). Jettison may be constructive as well as actual, *i.e.* if goods are taken out of the ship and put into boats or lighters, in order to float her when aground or lighten her, this is equivalent to a jettison; and if such goods are lost before they are put in a place of safety, they are a general average loss, and so are the boats containing them. If in such case the ship and rest of the cargo are lost, the lightened goods will not contribute to their loss; nor will the ship and cargo contribute to the loss of the lightened goods, if these were taken out of the ship for their own benefit, or in the usual course of navigation. Any damage incidental to jettison, to either the ship or other goods, is general average (Lowndes, 41, so held in the U. S.; *Maggrath v. Church*, 1803, 1 Caines, N. Y. 196); so is damage to goods by water being thrown down the ship's hatches, to put out a fire which has arisen in other goods (*Whitecross Wire Co. v. Savill*, 1882, 8 Q. B. D. 653), or owing to water going down the hatches while opened for a jettison (Lowndes, 42). American law distinguishes between goods already on fire and other goods damaged by water thrown down to put the fire out, and only allows damage to the latter in general average (*Columbian I. C. v. Ashby, ante*). Cargo pumped up is not general average (*Hills v. London, A. C.*, 1839, 5 Mee. & W. 569). Goods jettisoned are not abandoned, but can be recovered on paying salvage for them. Goods given up to pirates by way

of composition are a general average loss (*Hicks v. Palington*, Moo. 297), but not if they are forcibly taken by pirates or plunderers (*Nesbitt v. Lushington*, 1792, 4 T. R. 783; 2 R. R. 519). A sale of goods from necessity in a foreign port, in order to raise funds for the adventure, or to replace general average losses, is general average (*Hallett v. Wigram*, 1850, 19 L. J. C. P. 281), but not if it be on account of a single interest (*Powell v. Gudgeon*, 1816, 5 M. & S. 431), *e.g.* to release the master of the ship arrested for the price of necessary repairs done to her (*Hopper v. Burness*, 1 C. P. D. 137, see below, *Dobson v. Wilson*, 1813, 3 Camp. N. P. 480; 14 R. R. 817). If such goods are sold for less at their port of refuge than they would have fetched at their destination, *semble* their owner can recover for the larger value (*Richardson v. Nourse*).

Thirdly, in the case of *freight*. Freight lost by jettison of goods (Arn. 864, so held in United States; Phillips, 1287), or by voluntary stranding of ship (Phillips, 1302), or by sale of goods for general average purposes (Carver, 433), is a general average loss.

Expenditures.—The distinction between these and sacrifices is that these give an immediate vested claim to compensation, while sacrifices are only made good subject to the ultimate safety of the adventure. The chief characteristics necessary to make them general average are that they must be made for the common safety, and must be extraordinary in their nature. The following are general average expenses as made for the common safety :—(a) Salvage for getting a ship out of a position of peril (*e.g.* capture or shipwreck) is, in practice, considered general average, although in law it is quite distinct from it, and by maritime law all property saved from danger is liable individually for its proportion of the salvage awarded against the whole of the adventure to which it belongs. The best illustration of this is that the Admiralty Court could issue process for salvage, but not general average (*The Cargo ex Ealam*, 1863, 32 L. J. Ad. 97). Salvage is, strictly speaking, only general average when the amount is agreed beforehand, and that amount is necessary for the common safety. Thus, money expended by the master in getting a stranded ship afloat for the common benefit of ship and cargo is general average (*Kemp v. Halliday*, 1875, L. R. 1 Q. B. 520), although the fact that he has paid what is a reasonable and prudent sum, according to his judgment, does not decide what sum was necessary to extricate the ship and cargo from danger, and the latter fact must be specially proved before that payment can be brought into general average (*Anderson v. Ocean S. S. Co.*, 1884, 10 App. Cas. 107). The shipowner cannot claim in general average remuneration for arranging the salvage operations of the whole adventure, in the absence of any express contract to that effect between himself and the shippers (*Schuster v. Fletcher*, 1878, 3 Q. B. D. 418). Unless the safety of both ship and cargo be in peril, no expenditure can be general average; thus, if the safety of the ship be hopeless, or the cargo have been taken out of the ship for its own safety, expenditure made with the object of getting the ship into a safe position is not general average (*Royal Mail Steamship Co. v. English Bank of Rio de Janeiro*, 1887, 19 Q. B. D. 362); and in neither case does the cargo contribute anything; for taking out the cargo will make no difference to the ship, nor will heaving off the ship affect the cargo. The practice of adjusters here, however, is to make the ship contribute to the cargo, if she is successfully floated. If a ship is accidentally stranded, the expenses of discharging the cargo, reloading it, and resuming the voyage, are, in practice, brought into general average; but if lightening her of the cargo does not make her float, the expense incident to other

means of getting her off falls on her only (*Job v. Langton*, 1856, 6 El. & Bl. 779; *Walthew v. Mavrojani*, 1870, L. R. 5 Ex. 116); put shortly, it is only if the discharge of the cargo and getting the ship off are all one continuous operation for the common safety that the expenditure is general average (*The Copenhagen*, 1799, 1 Rob. C. 289; *Moran v. Jones*, 1857, 7 El. & Bl. 523, though this latter case has been doubted on the facts in *Svendsen v. Wallace, ante*; *Hall v. Janson*, 1854, 4 El. & Bl. 500).

(b) Another general average expenditure is payment of ransom to pirates or plunderers, or a compromise between belligerents and neutrals, but not ransom to public enemies (Phillips, 1335-7; Arn. 888), except as allowed by the Prize Act, 1864, s. 45.

(c) So is money raised abroad for general average purposes, with all its incidental expenses, such as exchange, interest, etc. (Phillips, 1357; Arn.

(d) Port of refuge expenses are in some cases general average. When a ship is obliged, for the general safety, by damage caused by sea perils, to put into port to repair, the expense of putting into port and landing the cargo are general average (*Svendsen v. Wallace*, 1885, 10 App. Cas. 404); but the expense of warehousing the cargo falls on the cargo, and that of reloading the cargo and leaving the port on the freight. On the other hand, when the ship is obliged to do so in order to repair a general average loss, all the above expenses are general average (*Atwood v. Sellar*, 1880, 5 Q. B. D. 286). The expense of repairing, in the former case, is particular average on the ship, while in the latter it is general average (*Plummer v. Wildman*, 1815, 3 M. & S. 482; 16 R. R. 334; *Power v. Whitmore*, 1815, 4 M. & S. 141; 16 R. R. 416).

The necessity for the expenditure being extraordinary is illustrated by the following instances:—Wages and provisions for the crew during repairs are neither general nor particular average (*De Vaux v. Salvador*, 1836, 4 Ad. & E. 420), nor are they during detention by capture, or embargo, or any other *vis major* (*Robertson v. Ewer*, 1785, 1 T. R. 127; 1 R. R. 164; *Sharp v. Gladstone*, 1805, 7 East, 24; 8 R. R. 583). Expenses, owing to detention, are not general average, whether due to waiting for convoy, unless the danger is so imminent that they are necessary for the general safety, or to quarantine, or to ship being frozen up in the ordinary course of the voyage (Arn. 882).

Expenditure may be extraordinary in its amount and yet not in its nature, and so not general average, e.g. an expenditure of £1400 in coals to work the auxiliary screw of a sailing-ship damaged by an iceberg, and unable to sail on her voyage home from the West Indies, in itself gives no claim to contribution, though thereby the general average of making a port of refuge, and keeping the cargo there for repairs, was avoided (*Wilson v. Bank of Victoria*, 1867, L. R. 2 Q. B. 203). Hire of extra hands to pump a ship after springing a leak is general average (*Birkley v. Presgrave, ante*), but not hire of extra hands in place of deserters from the crew (*Plummer v. Wildman, ante*), nor gratuities promised to seamen in time of danger to induce them to do their duty (*Harris v. Watson*, 1790, 2 Psa. 102; 3 R. R. 654; *Harris v. Carter*, 1854, 3 El. & Bl. 559). But if it will be actually dangerous for the ship to go to sea shorthanded, extra pay to the crew on board is general average (*Hartley v. Ponsonby*, 1857, 7 El. & Bl. 872).

4. *Contribution to General Average Losses.*—The general rule is, that sacrifices or expenditures made for the preservation of the whole adventure, i.e. ship freight and cargo, are made good to the owner of the interest sustaining the loss by a contribution levied on the whole adventure. There are two exceptions to this general rule, which are concisely stated by Lord Watson

in delivering the judgment of the Privy Council in *Strang, Steel, & Co. v. Scott*, ante, the facts of that case being that a ship had been stranded owing to the negligence of the master, and for the general safety it became necessary to jettison part of the cargo, and the judgment allowing the owners of the jettisoned cargo to recover general average contribution for its loss, but not the shipowner for the damage done by the jettison to the ship. "There are two well-established exceptions to the rule of contribution for general average. When a person who would otherwise have been entitled to claim a contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property (*Schloss v. Heriot*, 1863, 14 C. B. N. S. 59). The second exception is in the case of deck cargo. According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded in a question with the other shippers of cargo as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon the deck; and the exception does not apply either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted; or (2) in any case where the other owners of cargo have consented that the goods jettisoned shall be carried on the deck of the ship." In these latter cases jettison of deck cargo is a general average (*Gould v. Oliver*, 1840, 2 Sco. N. R. 152, where deck-load of timber carried by consent of shipowner, and jettisoned, was contributed for by shipowner to goods owner; *Hurley v. Milward*, 1839, 1 Jones & C. 24, where jettison of pigs carried by custom of the Irish trade on deck, was contributed to by shipowner; *Johnson v. Chapman*, ante, where jettison of deck-load of deals carried in a chartered ship was contributed to by shipowner; *Wright v. Marwood*, ante, where jettison of cattle carried on deck under a bill of lading exempting the shipowner from liability for any accident or injury of any kind or nature whatsoever, was held not to be a general average loss to which shipowner and shipper below deck must contribute; *Burton v. English*, ante, where it was held that a charter-party stipulating that "the ship shall be provided with a deck-load if required, at full freight, but at merchant's risk," did not exclude the right of the charterer to contribution from the shipowner to jettison of deck cargo which was carried by the custom of trade). The United States apply the general rule strictly, and allow no exception in favour of local or trade usage, but Phillips's opinion is that the better doctrine is to allow the exceptions of usage or notice (Phillips, 1282). On the other hand, a usage not to contribute to jettison of deck cargo, though allowed, has been held to be valid (*Miller v. Titherington*, 1861, 30 L. J. Ex. 217).

5. *What contributes to General Average.*

The general rule is that "all that is ultimately saved out of the adventure contributes to make good the general average loss, provided it was actually at risk at the time and under the circumstances in which the loss was incurred" (Arn. 888). "Whatever is eventually saved must contribute for what has been purposely sacrificed" (Phillips, 1318); but this applies only to property saved, and not life (Carver, 420). Thus,

goods landed before a jettison, or landed after a jettison, do not contribute; in case of successive jettisons, the goods jettisoned are for the purpose of contribution supposed to continue on board, and therefore contribute to later jettisons on the same voyage (Arn. 889). And generally any interest which is not at risk at the time of the general average loss, will not contribute to it. The owner of the interest suffering the loss contributes to his own general average loss no less than those of the saved interests; thus, goods which have been sold for the common safety contribute, and so does the freight of goods jettisoned or sold (*Hill v. Wilson*, 1879, 4 C. P. D. 329; Carver, 416).

The following interests on board contribute:—"All merchandise put on board for the purposes of traffic" (Park, J., *Brown v. Stapylton*, 1827, 4 Bing. 119); deck cargo, though it is not always contributed for; goods belonging to Government by practice of adjusters (so held in United States, *U. S. v. Wilder*, 1838, 3 Sumner, 308); gold, silver, jewels, and precious stones, not attached to the persons of the passengers. On the other hand, the following do not contribute:—Wearing apparel and ornaments and jewels, and money attached to the person; perhaps banknotes (Phillips, 1397); passengers' luggage; seamen's wages; provisions, whether for passengers or crew (*Brown v. Stapylton*, *supra*, where provisions shipped for the use of a cargo of convicts were held free from contribution), for they contribute under ship, or passage-money, or freight; though Phillips and Arnold both think that provisions for the use of passengers or animals should contribute, but not if the latter are going to a market, for their value reappears (Arn. 891; Phillips, 1399).

6. *The Principle and Amount of Contribution*.—The general principle is thus stated:—"The loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated, according to the loss sustained on the one hand, and the benefit derived on the other" (Bovill, C. J., *Fletcher v. Alexander*, 1868, L. R. 3 C. P. 382), or, as more fully expressed, "The party whose property has been sacrificed, or his money disbursed, or his credit pledged for the general benefit, must be placed exactly in the position in which he would have stood if the sacrifice had been made not by himself but by one of his co-adventurers" (Arn. 891). He is bound equally with his co-adventurers to contribute towards his own loss: thus, in case of a sacrifice, for the purposes of adjustment the property sacrificed is treated as if it had remained on board the ship; in the case of expenditure, his rateable share of it is deducted from the contribution paid to him.

It has already been pointed out that a general average sacrifice only gives a right to contribution if the ship and cargo eventually arrive safe; whereas an expenditure is contributed for, whatever be the event of the voyage. It may thus be important to determine whether a general average loss is a sacrifice or an expenditure, *e.g.* where goods are sold for general average purposes in a port of distress. The opinions here and in the United States are conflicting (Arn., 894; Carver, 432; Phillips, 1363; Kent, iii. 212), and there is no direct decision on this point; but there have been decisions that if goods are sold for the purpose of getting the ship repaired in a port of distress (*i.e.* for a particular interest, the ship), the value is to be reimbursed to their owner, whether the ship arrive in safety at her destination or not. If she does not arrive, their value to be made good is their net value at the port of distress (*Powell v. Gudgeon*, 1816, 5 M. & S. 431; 17 R. R. 385; *Atkinson v. Stephens*, 1852, 7 Ex. Rep. 567). If she does arrive, the goods must be contributed for either at the net value which they would have had at their destination, or at the value for which they sold at the port of distress, their owner being able to choose whichever

is the higher value. And if the sale was for general average purposes, their owner can recover that higher value in general average (*Richardson v. Nourse*, 1819, 3 Barn. & Ald. 237; 22 R. R. 368). Analogy from these cases favours treating a sale of goods for general purposes as an expenditure (Arn. 901), being "a forced loan from the shipper to the shipowner" (Brett, J., *Hopper v. Burness*, 1876, 1 C. P. D. 137).

The amount of contribution may be very different, according as the general average loss is a sacrifice or an expenditure. In the former case, the right to contribution arises only at the termination of the voyage, for the property sacrificed is regarded as though it were still at risk, and formed part of the whole adventure on which the contribution is assured at adjustment; in the latter case, the right to contribution arises at once, and is independent of whether the adventure arrives safely or not; and any expenditure made by the shipowner, either from his own funds or by loan from somebody else, must be fully reimbursed, whatever the result of the voyage (Lowndes, 179). Accordingly, it is only in cases of sacrifice that it is doubtful what compensation is due for the loss, for the amount remains in uncertainty till the end of the voyage.

In the case of a general average sacrifice, either of ship or ship's material, the loss actually sustained must be made good to the shipowner. If the ship be totally lost, the amount of contribution is her value to her owner at the time she was lost, as if she were then in safety (so held in *U. S. Columbian I. C. v. Ashby*, ante); and if she become a constructive total loss (i.e. not worth repair), owing to the general average sacrifice, the amount of compensation due for her is her value, prior to the sacrifice, minus her salvage at the port of refuge. Thus, where a ship, after being much damaged by sea perils, and laid on her beam-ends in a storm, had her masts cut away in order to right her, and on arriving at a port of refuge was sold, as not worth repair, for £880, and her value before the general average sacrifice was estimated at £6000, and the estimated cost of repairing her after it was £9000, of which £3000 was due to particular average, the Court of Appeal held, confirming Mathew, J., that the value of the ship to be contributed to in general average was that proportion of her value before the general average loss which the cost of the general average repairs bore to the particular average repairs, namely, two-thirds of £6000, minus the £880 salvage (*Henderson v. Shankland* [1896], 1 Q. B. 525). Where the sacrifice is of ship's material, the amount to be contributed to is the actual cost of repair, deducting one-third new for old; if the ship is of wood, and is on her first voyage, at the place where the repairs are done; if no repairs are done, then it is the estimated cost of making good the loss at the place where the voyage ends (Lowndes, 190; Carver, 421).

In the case of freight, the amount of contribution is its net amount payable to the shipowner; thus, in a case of jettison, the freight payable on arrival of the jettisoned goods is to be contributed for (Lowndes, 180), and so it is if the ship is totally disabled, e.g. by voluntary stranding (*Columbian I. C. v. Ashby*, ante). If, in this latter case, the goods can be sent on, the freight payable to the substituted ship must be deducted from the freight for contribution (*Kidston v. Empire M. I. C.*, 1867, L. R. 1 C. P. 535); and if the earning of freight does not depend on the arrival of particular goods on board a particular ship, the freight of a substituted cargo reduces the claim for freight of the jettisoned goods (Lowndes, 184). According to Phillips, freight of jettisoned goods is contributed for at its gross amount, and so also if the ship be totally lost (1368). Where there are two freights being earned on board a ship, namely, under charter-party and under bill

of lading, it seems the shipowner can only claim on the latter (Carver, 435 and 436).

In the case of cargo, the amount of contribution is the net market value it has at the port of discharge, *i.e.* the price it fetches, deducting freight, landing, and sale charges (Lowndes, 181; Carver, 419). If the jettison is made so early in the voyage that the adjustment is made at the port of departure, the value to be made good is the cost price of the goods on board, *i.e.*, including shipping charges but not insurance premiums (Phillips, 1362, 5). Where the jettisoned goods, if they had remained on board, would, like the rest of the cargo, have arrived in a damaged condition, their value is the net value for which they would have sold in a damaged state (*Fletcher v. Alexander, ante*); and, similarly, any leakage or breakage which would have affected them should be allowed for. In practice, however, the rule is difficult to apply, and when the goods are sound at the time of jettison, and the cargo arrives partly sound and partly damaged, the loss of the jettisoned goods is contributed for at their sound value (Lowndes, 183). The amount of damage caused by jettison to ship or goods is the difference between their net damaged proceeds and what their sound proceeds would have been. If jettisoned goods are recovered before adjustment, their loss is the damage done by the jettison and the expense of recovering them; if after adjustment, any excess of the contribution paid over that loss is repaid (Arn. 900). If valuables are jettisoned, which are not described at their proper value, they are contributed for only at their declared value; if no declaration of their value be made, and this be due to fraud (and perhaps negligence) on the part of the shipper, the value to be contributed for is only that of such goods as the master might reasonably suppose them to be (Phillips, 1372; *Lebeau v. Gen. Steam N. Co.*, 1872, L. R. 8 C. P. 88). Goods sold for general average purposes, as noticed above, are contributed for either at their value at the port of refuge, or the value they would have had at the port of destination, certainly if the ship arrives, and perhaps if she does not.

7. *The Apportionment of the Contribution.*—The value of the various interests for making contribution corresponds generally with their value for receiving contributions: "the basis for contribution for property saved is the same as the basis of allowance for property sacrificed" (Lowndes, 192; Carver, 418); and indeed this seems to follow from the principle governing general average sacrifices, namely, that the thing sacrificed is treated as forming part of the adventure till the voyage is ended. Phillips (1369), however, seems to intimate an opinion that the two values need not be the same, and that in the case of ship and freight the gross value at the time of the loss is the amount to be made good to them. Generally, the contributory value of the different interests is their value to the owner at the time and place at which the liability of the parties to the adventure is definitely determined (Arn. 901). In principle, from what has been already said, it is clear that the time and place of determining the liability is different in the case of an expenditure, from what it is in the case of a sacrifice, and contribution becomes due the moment the outlay is made, so that the various interests should contribute on their values at that moment, without regard to any partial or total loss which may befall them before the end of the voyage (Phillips, 1374; Lowndes, 167); while in the case of sacrifice the interests contribute on their net value, as they actually come to their owner's hands at the end of the voyage (Arn. 902). The practice is, however, to adjust the contributions to both kinds of loss on the net saved value of the interests; and Carver supports it (428).

The contributory value of a *ship* is her worth to her owners at the time and place of adjustment; that will generally be the market-value of such a ship in an ordinary employment (*Grainger v. Martin*, 1860, 2 B. & S. 456; Lowndes, 193; Hopkins, 143); but if she is designed for, or engaged in, a particular trade, some different measure, such as her cost price, less deterioration, may be adopted (*African S. S. Co. v. Swanzy*, 1856, 25 L. J. Ch. 870). She will then contribute according to the condition in which she arrives at the end of the voyage, before any repairs are done to her (Carver, 422). There is no fixed rule for determining her value, but one way is to ascertain her value when she sailed, and deduct from it the provisions and stores expended, the wear and tear of the voyage, and any partial losses suffered, or contributions due from her in general average; while the value of the thing sacrificed, if it belongs to the ship, and also any general average contribution due to her, must be added to it (Phillips, 1380; Lowndes, 194).

The contributory value of *freight* is the amount of freight eventually saved. Some freight, therefore, must be pending at the time of sacrifice, or it will not contribute at all (*Cox v. May*, 1815, 4 M. & S. 152; 16 R. R. 422); thus, if the cargo has been delivered before the loss takes place, and the freight is thus earned, it does not contribute, because it is not at risk. For the same reason, advance freight (which is not to be repaid in any event) does not contribute as freight in the hands of the shipowner, though it does in the hands of the shipper, as part of the value of his goods (*Trayes v. Worms*, 1865, 34 L. J. C. P. 374). If only *pro rata* freight be pending, that will contribute (*Magrath v. Church*, U. S. ante). The amount of freight pending will depend on the charter or bill of lading under which the goods were shipped; and it has been held that if a ship be chartered for a voyage out and home, at one entire sum, which is to be paid on her safe arrival at the home port, and a general average loss happens on the outward voyage, the entire freight contributes (*Williams v. London Assurance Co.*, 1813, 1 M. & S. 318; 14 R. R. 441). If the freight be apportioned by the charter-party, probably only the freight accruing on the passage during which the loss occurs, contributes, and *a fortiori* this will be so if the passages are separate voyages (Arn. 906). This has been so held in the United States (*Spafford v. Dodge*, 1817, 14 Mass. 66). Where ship is chartered for subsequent voyages, unless they have a peculiar value for the shipowner, the freight to be earned on them will not contribute to loss on a previous voyage (Carver, 439). And where there is both a chartered and a bill of lading freight pending on the voyage, it seems the latter determines the contributory value of the freight (435). And see Lowndes (204).

The freight, if contributory, contributes on its net value, which is ascertained by deducting from the gross freight the wages of master and crew accruing after the loss, but without taking provisions into account (Arn. 907; Lowndes, 211). It will not contribute at all if it be swallowed up by wages of the crew during detention at sea by weather or in port by embargo; nor if the ship be disabled either before or after the general average loss, and the cargo is transhipped at an expense equal to, or greater than, the original freight, and if the substituted freight be less, only the difference between it and the original freight contributes (Phillips, 1388, 9). All contributions to general average, and other losses and expenditures falling on the freight subsequent to the general average loss, are deducted (1391). The freight on goods lost by a voluntary stranding, as well as that lost on the goods saved, contribute to it (Carver, 434).

The contributory value of *goods* is the same as the value to be made good to them by contribution, *i.e.* their market price at the end of the voyage, less freight, landing, and sale charges (Phillips, 1394; Lowndes, 194; Carver, 419). If the loss is a jettison (or sale, if that be a sacrifice, see *ante*), the value of the goods lost must be added to that of the goods saved. If the goods saved arrive in a damaged condition, they contribute on their damaged value, unless the damage is due to the act of sacrifice, when they will contribute on their sound value, for the contribution due to them makes up the difference to them (*Fletcher v. Alexander, ante*; Arn. 908). In practice, goods are not allowed to have successive values, though several general averages happen on the same voyage.

8. *Adjustment of General Average.*—The place of general average adjustment is generally the place where the voyage actually ends, whether that be the contemplated destination or not, and the law and custom of the country to which the port of destination belongs decides the method of adjustment. "The adjustment must be made at the port of destination, if it be reached; but if the voyage is interrupted by some supervening cause, which necessitates or justifies its termination at some intermediate place, that place is the proper place of adjustment" (Cockburn, C. J., Ex. Ch., *Mano v. Ocean M. I. Co.*, 1875, L. R. 10 C. P. 414; Carver, 416). When that port is a foreign one, the adjustment is called a foreign adjustment. If the voyage is broken up by sea perils, and the cargo is discharged at an intermediate port, or even the port of departure, the adjustment is made there on the values of the different interests at that time (*Fletcher v. Alexander, ante*). But if the voyage is not terminated by necessity at a port other than the port of destination, an adjustment made there is not binding unless all the parties expressly assent to it (*Hill v. Wilson*, 1879, 4 C. P. D. 329). Although by the law of the place of adjustment certain expenses may be allowed in general average, which would not be so included here, the parties to the adventure are nevertheless bound by the adjustment (*Simmonds v. White*, 1824, 2 Barn. & Cress. 805, a Russian adjustment; so *Dalgleish v. Davidson*, 1824, 5 D. & R. 6; *Newman v. Cazalet*, Park, 630, Pisan adjustment; *Walpole v. Ewer*, 1789, *ante*-Danish adjustment); *a fortiori*, if express provision is made by the contract of sea-carriage, that general average shall be determined according to a particular law or set of rules, *e.g.* general average to be adjusted "according to York-Antwerp rules," or "*per* foreign statement" (*The Mary Thomas* [1894], P. 108, "on Dutch terms"; *Hendricks v. Australasian I. Co.*, 1874, L. R. 9 C. P. 460).

The persons liable to pay the general contributions found due are the owners of the interests upon which they have been apportioned. The shipowner has a lien on the goods for their contributions, whether on his own account or that of other shippers, which it is the duty of the master to enforce, and he is liable to the persons entitled to contribution if he delivers the cargo to its different owners without security for the payments due from it (*Crooks v. Allan*, 1879, *ante*; *Strang, Steel, & Co. v. Scott*, 1889, *ante*). In the case of a general ship, the master generally takes a bond from the different consignees before delivering the cargo, but such bond must be reasonable in its terms, or it may be refused enforcement (*Huth v. Lamport*, 1886, 16 Q. B. D. 442, 735). This lien is possessory only, and, if lost, the master may sue for the contributions (*Anderson v. Ocean S. S. Co.*, *ante*); in the Admiralty Court no action lay for general average contributions unless the ship was under the arrest of the Court for some other claim (*Cargo ex Ealam*, 1863, *ante*). If, however, the consignee of goods is not their owner, he is not liable for

general average contributions due upon them, though he has notice of the liability when he takes delivery of the goods (*Scaife v. Tobin*, 1832, 3 Barn. & Adol. 523); but if he does so under circumstances from which a promise to pay the contribution can be inferred, he will be liable (*Hingston v. Wendt*, 1876, 1 Q. B. D. 367). If a consignee becomes an owner only after the general average loss occurred, it seems he will not be liable (*Scaife v. Tobin*, ante); but in practice the person liable is generally the insurer of the goods, the policy being transferred with the goods (*Carver*, 443). A goods owner entitled to contribution can sue the ship-owner or the other shippers, but he has no lien which he can enforce on the ship and cargo, unless they are already under Admiralty arrest, except by counter-claim (*The Oquendo*, 1878, 38 L. T. 151).

9. *Relation of General Average to Insurance*—General average, though in practice closely associated with insurance, is quite independent of it both in origin and principle, for it has been defined as "a consequence of the perils of the sea, first imposed by the Rhodian law many centuries before insurance was known at all, just as salvage is imposed by the maritime law, not so early, but at least long before any policies of insurance in the present form were thought of" (Lord Blackburn, *Aitchison v. Lohre*, 1879, 4 App. Cas. 765). But where the interests forming a maritime adventure are insured, general average losses and contributions are considered to be caused by perils of the sea, and thus were within the policy (*Hall v. Janson*, 1856, 4 El. & Bl. 500). Jettison is expressly insured against in the ordinary Lloyd's policy, and in that case the assured whose goods have been jettisoned need not wait to recover contribution from the other interests, but can at once recover the value of the goods from his underwriter, and the latter on making payment is subrogated to the rights of the assured (i.e. has them transferred to him), and can recover contribution for the loss (*Dickenson v. Jardine*, 1868, L. R. 3 C. P. 639; Phillips, 1348). Lowndes would extend this rule to all general average sacrifices (227). Any contributions payable under an adjustment are reimbursed by the underwriter to the assured, provided that the adjustment is a binding one on the parties (i.e. made at the proper place), and that its terms are warranted by the law of the country where it is made (*Newman v. Cazalet*, ante; *Pouer v. Whitmore*, ante). If there is no stipulation in the policy to pay general average, according to foreign adjustment or particular rules, the underwriter is only liable to pay general average proximately due to perils insured against in the policy; if there is such a stipulation, he must pay whatever is general average by that statement or those rules, whether it was caused by a peril insured against or not (*Harris v. Scaramanga*, 1872, L. R. 7 C. P. 481; *Greer v. Poole*, 1880, 5 Q. B. D. 272).

The assured will recover from the underwriter, in respect of general average losses, that proportion of the loss which the sum insured by the policy bears to the insurable value of the property; and in respect of general average contributions, that proportion of the contribution which the insurable value of the property bears to its contributory value; for the former and not the latter value is the only basis of reimbursement between the assured and the underwriter. Whatever is paid in contribution in excess of the contributory value, over the value in the policy, is paid by the assured, but for whatever is paid on the contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured (Arn. 916, quoting Magens, 245). But if the underwriter engages to pay general average on foreign adjustment, he must reimburse on the same basis as that on which the contributories have been compelled to pay.

under a foreign adjustment (Barnes, J., *The Brigella* [1893], Prob. 200). Where all the interests concerned in the voyage are owned by the same person, a loss incurred for the common safety gives no right to contribution, for the owner would be contributing to himself. But if those interests are separately insured, it is a doubtful question whether the assured or his underwriter on one interest can recover contribution from the other underwriters (*Oppenheim v. Fry*, 1863, 38 L. T. 387; *The Brigella*, above). See MARINE INSURANCE.

Particular Average has been already defined above. It is used in two senses—(a) As between one party to a maritime adventure and the others; (b) As between that party and his underwriter. In the first sense, it means any loss sustained by any one interest, whether arising from a danger peculiar to itself, or from one common to the whole adventure which lies where it has fallen (Carver, 361), or a “loss borne wholly by the party upon whose property it takes place, so called in distinction from a general average for which divers parties contribute” (Phillips, 1422). In the second sense, it is any partial loss to the interest insured, caused by perils insured against in the policy. The latter sense is not considered here, as it will be found under MARINE INSURANCE. It is enough here to say that the two senses are not co-extensive, and a loss may be a particular average, so far as the suffering interest is related to the whole adventure, which is not a particular average loss recoverable from the underwriter who has insured that interest, e.g. wages and provisions for ship’s crew during detention for repairs and embargo (*Robertson v. Ever*, ante).

Phillips gives the following instances of particular average losses:—Masts sprung or carried away; vessel damaged by getting ashore, or being strained through stress of weather; accidental stranding; collision; capture; repairing or replacing damaged parts of ship; deck goods washed overboard; goods heating from inherent vice (1424).

The term *average* is also used in connection with fire insurance; if a fire policy is declared subject to average, the meaning is that if the property covered at the time of fire exceeds the sum insured, the assured will only receive the proportion of the loss which the insurance bears to the value of the goods (Porter, *Insurance*, 235). By analogy to the rule of general average in marine insurance, where houses are pulled down or blown up in order to check a fire, the loss caused is part of the damage caused by the fire for which the insurer must pay. In London, all damage done by the Fire Brigade in putting out fire is “damage by fire” within a policy of insurance (*ibid.* 117; see Phillips, 1098).

[See Arn. *Marine Insurance*, 6th ed.; Abboth, *Shipping*, 13th ed.; Lowndes, *General Average*, 3rd ed.; Phillips, *Marine Insurance*, 5th ed.; Carver, *Carriage by Sea*, 2nd ed.; Hopkins, *Average*; Porter, *Insurance*.]

Averments.—See INDICTMENT.

Avoidance, Plea in Confession and.—This was the description applied, under the system of pleading in force prior to the coming into operation of the Judicature Acts, to defences which, while admitting or confessing the truth of the fact, stated in the plaintiff’s pleading, alleged some new fact which avoided their legal effect (Bullen and Leake’s *Precedents of Pleading*, 3rd ed., p. 437). Although the Judicature Acts have in great measure abolished forms in pleadings, the description is still

applicable to defences of this character as distinguished from defences which are mere traverses or denials of the alleged cause of action. Pleas in confession and avoidance were divided into two classes, namely, pleas in justification or excuse, and pleas in discharge (Stephen on *Pleading*, 7th ed., p. 183). Pleas in justification or excuse stated facts which showed that the plaintiff never had any cause of action, as, for instance, in an action for defamation, where a defendant admits either expressly or impliedly that he spoke or wrote and published the words complained of, but says that they were true in substance and in fact; or, in an action for an assault, where the defendant pleads that the plaintiff first attacked him, and that he thereupon committed the alleged assault in self-defence. Pleas in discharge stated facts, which showed a subsequent discharge of a once subsisting cause of action, as, for instance, in an action for the recovery of a debt, that the defendant had discharged the debt by payment; or, in an action for breach of a covenant, that the plaintiff had released the defendant by a subsequently executed deed. Under the former system of pleading all matters in confession and avoidance had to be pleaded specially (see *Regulæ Generales*, Trinity Term, 1853, rr. 8, 12, 17), and a like rule is now in force under the Judicature Acts (see R. S. C., 1883, Order 19, r. 15).

By the common law, a defendant could not plead to the same part of the declaration a traverse or denial, together with a plea in confession and avoidance (Bullen and Leake's *Precedents of Pleading*, 3rd ed., p. 441), but this rule was subsequently relaxed by the 4 & 5 Anne, c. 16, s. 4, and the 15 & 16 Vict. c. 76, ss. 81, 84; and it is now open to a defendant to plead to the same cause of action as many several matters as he may think necessary, subject only to the provision contained in R. S. C., 1883, Order 19, r. 27, enabling the Court or a judge to strike out or amend any matter in any pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and to the restriction contained in R. S. C., 1883, Order 22, r. 1, as to pleading a denial of liability together with payment into Court in actions for libel or slander. See further PLEADING.

Avowry.—An avowry is the pleading in defence in the action of replevin (see REPLEVIN). The defendant *avows*, or acknowledges, the taking of the distress (*q.v.*), and alleges reasons why it was legal. Stat. 11, Geo. II. c. 19, sec. 22, 1738, enabled defendants in replevin to avow generally that the plaintiff enjoyed the property whereon the distress was made, under a certain rent, and that the rent was then due, without showing the lessor's title.

Award.—See ARBITRATION.

Award (International).—See ARBITRATION (INTERNATIONAL).

Away-going Crops.—See LANDLORD AND TENANT.

"B" List.—See COMPANY.

Baby Farming.—The Infant Life Protection Act, 1872 (35 & 36 Vict. c. 38), passed in consequence of the report of a select committee of the House of Commons (*Parl. Pap.*, 1871, c. 272) requires the registration of all houses in which more than one infant under one year old is received for hire or reward, to be nursed or maintained apart from its parents for a period exceeding twenty-four hours, by a person who is not its relative or guardian (35 & 36 Vict. c. 38, s. 2 (3)).

Institutions established for the protection and care of infants and persons receiving children to nurse or maintain under the Poor Law Acts are exempt from registration (35 & 36 Vict. c. 38, s. 13).

A register is kept, in the county of London by the County Council (*q.v.*), in the City by the Commissioners of Sewers (*q.v.*), in boroughs by the town council (*q.v.*) (35 & 36 Vict. c. 38, ss. 1, 3, sch.), and in non-municipal districts by the district council (*q.v.*; and 35 & 36 Vict. c. 38, ss. 1, sch. 3; 56 & 57 Vict. c. 73, s. 27 (1) (*f*)), upon which the house and the name of the applicant for its registration are entered, without fee, for one year, if the house be suitable and the character of the applicant is satisfactory (35 & 36 Vict. c. 38, ss. 3, 4).

The persons registered must keep, and on demand produce, a register of all infants, taken in, in a book, in a prescribed form, supplied gratuitously by the local authority, and must enter when and from where a child was received, and when and by whom it was removed; and an inquest must be held on the body of an infant which dies in a registered house, unless a satisfactory certificate of a registered medical practitioner who attended the child is produced to the coroner (35 & 36 Vict. c. 38, ss. 5, 8).

When infants are seriously neglected, or the registered house becomes unsuitable, or the registered person incapable of providing for the infants, his name and house may be struck off the register (*ib.* s. 7).

The following breaches of the Act are punishable on summary conviction by imprisonment for not more than six months, with or without hard labour, or a penalty not exceeding £5, or erasure of the offender's name and house from the register:—(1) Receiving or retaining an infant in an unregistered house (ss. 2, 3); (2) Making false representations, or making or using false certificate, or falsifying register (s. 6; and see BIRTHS, REGISTRATION OF); (3) Not giving the coroner notice of the death of an infant in a registered house within twenty-four hours of its occurrence (s. 8).

The accused may elect to be tried by a jury for any of these offences (Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 17).

The expenses of administering the Act are payable out of the local rates, and the fees and fines received under the Act are paid to the account of the local rate (35 & 36 Vict. c. 38, ss. 10, 12, sch. 1). A bill was brought in 1896 to amend the Act (Bill 20), and a select committee of the House of Lords sat and reported on the working of the Act of 1872, and whether further steps were necessary to repress baby-farming and its attendant infanticide (*Parl. Pap.*, 1896, c. 343).

Back-Freight.—This is the freight payable by the owner of goods which cannot be delivered at their destination, owing to causes for

which the shipowner is not responsible, and are consequently carried back by the ship to the place from which they were shipped, or some other suitable place, if their owner gives no instructions to the ship with regard to them, and neither receives them nor arranges about their reception. The master, in such a case, becomes an agent of necessity for the goods owner; and if taking the goods back seems to him, in the exercise of a prudent judgment, and actually is, the best course to adopt for their interest, he is justified in doing so, and the goods owner must pay freight for the return voyage, which is called return or back-freight (*Cargo ex Argos*, 1873, L. R. 5 P. C. 134). The shipowner, however, is not entitled to back-freight if the voyage on which the goods are sent is an illegal one to his knowledge (*Hemp v. Jones*, 1787, 2 Chit. 550).

[Scrutton, *Charter-Parties*, 251; Stroud, *Jud. Dict.*]

Backgammon is a lawful game when played for money (13 Geo. II. c. 19, s. 9). See GAMING.

Backing-Warrants.—See ARREST and WARRANTS.

Bagatelle.—See BILLIARDS.

Bahamas, the most northerly of the British West Indian colonies, is a long chain of islands, of which about twenty are inhabited. The laws of the colony are English in their origin. See PRIVY COUNCIL, as to conditions of appeal.

Bail (*ballium*).—A person is said to be admitted to bail, when he is released from the custody of officers of the law, and entrusted to the private custody of persons, called his bail, who become bound as sureties to produce him to answer, according to law, to the charge or claim, at a specified date or place (1 H. P. C. 96).

In old records, when the accused could not find bail, an entry is found, "Let the prison be his bail."

Bail differs from MAINPRISE (*q.v.*), in that the sureties having the custody of their principal, if they think he means to flee from justice, may arrest him and take him before a justice, and surrender him on their own discharge (*Bond v. Isaac*, 1757, 1 Burr. 339; *Capron v. Archer*, 1757, 1 Burr. 340), or apply to a justice for a warrant for his arrest. When the warrant is executed they are discharged (Hawk., P. C., bk. ii. c. 15, s. 3). The obligation of the sureties is created by bond executed, or recognisance acknowledged by them. In Crown cases, civil or criminal, the recognisance is in the form of a bond, acknowledging indebtedness to the Crown in a specified sum, to be exonerated on conditions specified. As to civil cases, see BAIL BOND; BAIL PIECE.

Sureties must be sufficient, *i.e.* able to answer for the sum for which they are bound (Hawk., P. C., bk. ii. c. 15, s. 4; 3 Chit. *Gen. Pr.* c. viii. p. 8). As a rule, only householders are accepted. The following persons are not accepted in criminal cases: the solicitor or an accomplice of the person to be bailed, a married woman, an infant, or a prisoner. Before accepting surety, the Court

inquire of him on oath as to his means, and may require notice to the plaintiff, prosecutor, or police, usually twenty-four or forty-eight hours in criminal cases, to enable the necessary inquiries to be made as to the credit and solvency of the proposed surety. Commissioners for taking bail in civil cases were at one time appointed, but their powers are now given to all commissioners for oaths (52 & 53 Vict. c. 10, s. 1). "

A person who acknowledges bail in the name of another, without authority or excuse, is guilty of felony, and punishable by penal servitude, from three to seven years, or imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 90, s. 34; 54 & 55 Vict. c. 39, s. 1).

1. *Bail in Civil Matters.*—With the abolition of arrest on mesne process, bail in civil cases is virtually extinct. As to its form, see BAIL BOND; BAIL PIECE. Bail bonds continue in use in Admiralty actions *in rem*, for obtaining the release of arrested ships or cargo (R. S. C., 1883, Order 9, r. 10; Order 12, rr. 18–21; Order 29, rr. 6–18; Order 64, r. 10), and replevin bonds are still in use. See REPLEVIN.

A defendant in any personal action in which, before January 1, 1870, he would have been liable to arrest (under a *capias ad respondendum*), can still be arrested under writ of *ne exeat regno*, or sec. 6 of the Debtors Act, 1869, 32 & 33 Vict. c. 62, if (1) he is about to quit England; or if, (2) except in penal actions, his absence would materially prejudice the plaintiff's case. As to the procedure, see R. S. C., 1883, Order 69. On arrest the defendant can be imprisoned for not over six months, unless he secures an amount not exceeding the claim, by deposit in Court, or by entering into a bond to the plaintiff with one or more sureties, or giving such other security as the plaintiff will accept (Order 69, r. 3). The condition in ordinary actions is that the defendant will not leave England before the trial, without the leave of the Court; and in penal actions for the payment of any sum recovered, or render of the defendant to prison. As to arrest of absconding debtors, see 46 & 47 Vict. c. 52, s. 25; 53 & 54 Vict. c. 71, s. 7; and BANKRUPTCY.

In actions for the recovery of land from tenants holding over, the tenant can, under sec. 213 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), be required to enter into a recognisance, with two sufficient sureties, to pay the costs and damages. But see R. S. C., 1883, Order 3, r. 6; Order 14.

Bail or security on the removal of actions from Courts of inferior jurisdiction (other than County Courts) is regulated by 19 Geo. III. c. 70, s. 6; 7 & 8 Geo. IV. c. 71, s. 6; from County Courts by 51 & 52 Vict. c. 43, s. 126; and from the Mayor's Court by 20 & 21 Vict. c. clvii, ss. 8, 16–19 (*Morgan v. Bowles* [1894], 1 Q. B. 236).

2. *Bail in Crown Suits.*—As to bail in Crown suits and Revenue proceedings, see CROWN SUIT; EXCHEQUER PRACTICE.

3. *Bail in Criminal Proceedings.*

Bail by Sheriff.—The Sheriff, on executing a writ of attachment for security of the peace, may take bail on the terms stated in the body of the writ (Crown Office Rules, 1886, r. 282), or an order to find bail may be made on a return of *cepi corpus* (Crown Office Rules, 1886, rr. 286, 288, 289). Where the Sheriff executes a writ of attachment for contempt, he may admit his prisoner to bail (Short and Mellor, *Crown Office Prac.*, p. 400).

The Sheriff's other powers and duties as to bail in criminal cases are superseded in practice by those of justices (see Stephen, *Hist. Crim. Law Eng.*, in 233–237; and SHERIFF).

Bail by Police Constables.—Where a person is arrested without warrant, and cannot be brought before a Court of summary jurisdiction within

twenty-four hours of his arrest, a superintendent or inspector of police may admit him to bail (42 & 43 Vict. c. 49, s. 38); and in the Metropolis, persons brought to a police-station, in the night after arrest without warrant, for petty misdemeanours, may be bailed by the constable in charge of the station (10 Geo. IV. c. 44, s. 9).

Bail by Justices and Coroners.—On the adjournment of a preliminary inquiry into an indictable offence, the Court of summary jurisdiction may, in its discretion, admit the accused to bail on his own recognisance, with or without sureties, conditioned for the accused to attend at the time and place appointed for the adjourned hearing (11 & 12 Vict. c. 42, s. 21). These provisions also apply when the adjournment is for the purpose of considering whether the offence should be dealt with summarily (42 & 43 Vict. c. 49, s. 24), and a like provision is made as to bail, on adjournment of a charge triable summarily (11 & 12 Vict. c. 43, s. 16). There is some doubt whether the High Court can interfere with the discretion of a justice to refuse bail on remand (see Short and Mellor, *Crown Office Prac.*, p. 374).

As to bail on committal for trial the rules are as follows:—(a) On charges of treason, bail may not be granted by a justice except by order of a Secretary of State or of the High Court, or of a judge thereof in vacation (11 & 12 Vict. c. 42, s. 23). (b) Under s. 5 (2) of the Coroners Act, 1887, 50, & 51 Vict. c. 71, a coroner may admit to bail a person charged with manslaughter by an inquisition taken before him. (c) Bail by justices is discretionary on charges of felony, attempting to obtain any property by false pretences, and all misdemeanours, the costs of the prosecution whereof are payable out of the county or borough rate or fund (12 & 13 Vict. c. 42, s. 23; 42 & 43 Vict. c. 49, s. 49). For a list of these offences, see COSTS. The enumeration in 11 & 12 Vict. c. 42, s. 23, corresponds with that of 7 Geo. IV. c. 64, s. 23; but certain of the offences in both lists are now either abolished (38 & 39 Vict. c. 86), or dealt with as to costs, etc., by the Criminal Law Consolidation Act of 1861. (d) In the case of all other misdemeanours, bail is obligatory (11 & 12 Vict. c. 42, s. 23), if sufficient sureties are tendered. Demand of excessive bail is contrary to the Bill of Rights (1 Will. & Mary, sess. 2, c. 2). Refusal by a justice, from improper motives, to grant bail is said to be a misdemeanour (*R. v. Badger*, 1842, 4 Q. B. 66); and gives a cause of action against the justice (*Linford v. Fitzroy*, 1849, 13 Q. B. 240). These rules also apply to a person arrested upon warrant of a justice, on a certificate that an indictment has been found against him (11 & 12 Vict. c. 42, s. 3). The recognisances taken by justices are transmitted with the depositions to the Court of trial (11 & 12 Vict. c. 48, ss. 23, 24). Where bail is discretionary, the justice's duty is to consider the probability of the accused appearing on the remand, or to take his trial, and the character of the offence, the nature of its punishment, and the weight of the evidence, are of subsidiary importance (*R. v. Scarfe*, 1841, 10 L. J. M. C. 144; *Ex parte Barronet*, 1852, 1 El. & Bl. 1; *In re Robinson*, 1854, 23 L. J. Q. B. 286).

The committing justice may admit the accused to bail at any time after commitment for trial, up till the first day of the sittings of the Court at which he is to be tried, or if they are adjourned, up till the day to which they are adjourned (11 & 12 Vict. c. 42, s. 23); and in cases where bail is obligatory this power may be exercised, on the application of the accused, by a visiting justice of the prison to which the accused is sent, or any justice of the county or place in which it is situate (11 & 12 Vict. c. 48, s. 23).

The committing justice must also certify by indorsement or warrant of commitment his consent to bail, where it is discretionary or obligatory, and the amount which he thinks sufficient; and any justice attending at the

prison where the accused is, or the governor of the prison, may admit the accused to bail in conformity with the certificate, on production of the recognisances of the sureties duly taken (11 & 12 Vict. c. 48, s. 23, subs. (3); 42 & 43 Vict. c. 49, s. 42; 52 & 53 Vict. c. 63, s. 13 (111)). Where a justice admits to bail a person who is in prison, he makes out a warrant of deliverance, which is the authority for the prisoner's release (11 & 12 Vict. c. 42, s. 24, subs. (4)).

Where a person summarily convicted appeals to Quarter Sessions, the Court, before which he enters into a recognisance to prosecute his appeal, may, on his entering into the recognisance, or giving such other security as they think fit, release him from custody (42 & 43 Vict. c. 49, s. 31); and similar provision is made where he appeals to the High Court by case stated (20 & 21 Vict. c. 43, s. 3; 42 & 43 Vict. c. 49, s. 33).

Bail is taken before justices by stating verbally to the accused and his sureties the substance of the recognisance, and giving them a written notice thereof (11 & 12 Vict. c. 42, forms S (1) S (2); Summary Jurisdiction Rules, 1886, form 36). It may be taken in Court, or out of Court before any justice, the magistrates' clerk, or superintendent, or inspector of police, or the governor of the prison in which the accused is (42 & 43 Vict. c. 49, s. 42).

Bail by the Court of Trial.—The Court of trial may bail any person to be tried before it while awaiting trial or during his trial. Persons in custody, if not tried at the first practicable sittings of the Court, must be bailed, unless there are special reasons proved on oath for postponing the trial (31 Chas. II. c. 2, s. 6). Similar provisions are made by the Assizes Relief Act, 1889, 52 & 53 Vict. c. 16. As to the mode of taking a recognisance at Quarter Sessions, see *Ex parte Jefferies*, 1888, 52 J. P. 280. Under the First Offenders Act, 1887, special provision is made for releasing first offenders on bail (50 & 51 Vict. c. 25). After the conviction of the accused, if a case is reserved under the Crown Cases Reserved Act, 1848, the Court of trial may admit the convict to bail by recognisance, with one or two sufficient sureties, conditioned for his appearance at such time as the Court shall direct, to receive judgment, or render himself on execution (11 & 12 Vict. c. 78, s. 1).

Bail by the High Court.—Where a writ of error is obtained (otherwise than by the Attorney-General), after a conviction for misdemeanour, execution is not stayed, nor is the convict released from prison, until he is bound by recognisance of bail. The form of the recognisance is now prescribed by the Crown Office Rules, 1886, rr. 199, 200, form 127, which superseded the Acts 8 & 9 Vict. c. 68, and 16 & 17 Vict. c. 32 (both repealed by the Statute Law Revision Act, 1892).

The High Court has, and always has had, jurisdiction to admit to bail on a criminal charge, whether for treason, felony, or misdemeanour (Stephen, *Hist. Crim. Law*, i.), but not in case of outlawry (Hale, P. C., ii. 133). This jurisdiction does not extend to persons imprisoned in execution of sentence, unless there is an appeal pending, whether by writ of error, *certiorari*, or case stated on indictment, or appeal to Quarter Sessions, or by case stated to the High Court from summary convictions.

The contempt prisoner of another Court appears not to be bailable by the High Court; nor is a person, committed by the House of Lords or House of Commons, in any case within their established privileges (*re Sheriff of Middlesex*, 1840, 11 Ad. & El. 273). But the High Court can bail persons attached for contempt of itself, or to answer interrogatories (Short and Mellor, *Crown Office Prac.* 391, 400, 402).

In all cases of misdemeanour, the High Court is theoretically bound by the Habeas Corpus Act, 1679, 31 Car. II. c. 2, s. 2, to grant bail (Stephen, *Hist. Crim. Law Eng.* i. 243; *In re Annie Frost*, 1888, 4 T. L. R. 757), although, as to many misdemeanours, justices of the peace have a discretion (*v. sup.*, p. 445).

The powers of the High Court as to bail are the same whether the case is depending there or in an inferior Court. They are exercised—(1) By summons issued *ex parte*, by leave of a judge, for the issue of writs of *habeas corpus ad subjiciendum* to bring up the prisoner, and of writ of *certiorari* to bring up the depositions taken against him or the conviction; (2) By summons to show cause why the prisoner should not be admitted to bail before a justice of the peace. In felony cases, but not in misdemeanours, the leave of a judge is necessary for the issue of the summons. For procedure, see Crown Office Rules, 1886, r. 122; Short and Mellor, *Crown Office Prac.* 378–382.

There is no appeal from a refusal by a judge at chambers to grant bail or a writ of *habeas corpus*, either to a Divisional Court or the Court of Appeal (36 & 37 Vict. c. 66, s. 50; and 57 & 58 Vict. c. 76, s. 1 (1) (b); *R. v. Foote*, 1883, 10 Q. B. D. 378; *Ex parte Pulbrook* [1892], 1 Q. B. 86): but the applicant has a right to renew his application to a Divisional Court, and if it be for a *habeas corpus* may go the round of the High Court and to the Lord Chancellor; *Ex parte Wideman*, 1848, 12 Jur. O. S. 719; *Ex parte Coppin*, 1866, L. R. 2 Ch. 47). Where the High Court allows bail in felony, four sureties are usually required. In misdemeanours, two are enough. Such bail is justified either before a judge at chambers or the Master of the Crown Office, or, if so ordered, before a justice resident near the place where the accused is imprisoned (Short and Mellor, *Crown Office Prac.* 381, 382).

Enforcing Recognisances.—In criminal cases, a recognisance, if for some thing to be done before a Court of summary jurisdiction, can be enforced by such Court, by an order declaring it forfeited, and the payment of the sum secured is enforced in the same way as payment of a fine imposed on conviction (42 & 43 Vict. c. 49, ss. 9, 21 (3)). This provision applies equally to proceedings under the Indictable Offences Act, 1848, and the Summary Jurisdiction Acts, and supersedes the old law which required such recognisances to be sent to the clerk of the peace with a certificate of non-compliance, and left the forfeiture to the Court of Quarter Sessions.

In the High Court, the Court orders the recognisance to be estreated into the Exchequer, *i.e.* extracted from the other records and enforced under 22 & 23 Vict. c. 21, s. 28.

In Courts of Quarter Sessions, after an order made to forfeit a recognisance, the amount is levied by the Sheriff and returned to the Treasury by the clerk of the peace, under the Levy of Fines Acts, 1822 and 1824, 3 Geo. IV. c. 46; 4 Geo. IV. c. 37.

See also BAIL (ADMIRALTY).

Bail (Admiralty).—In Admiralty proceedings *in rem*, the owner of the *res* is generally entitled to have his property released from arrest on giving bail to an amount equal to the value of the property. This applies to defendants on counter-claims (*i.e.* plaintiffs), as much as to defendants on claims; and where, in the former case, the defendant's ship has been arrested, and the plaintiff's ship cannot be arrested, the plaintiff's action may be stayed till they give security to answer judgment on the counter-claim (24 Vict. c. 10, s. 34; *The Charkich*, 1873, 42 L. J. Adm. 70). But if the defendant's

ship is not arrested, nor bail required for her, or if the plaintiffs discontinue their action, the defendants cannot get bail on their counter-claim (*The Muc Home*, 1882, Asp. 591; *The Alexander*, 1883, 5 Asp. 89); and the plaintiffs, in an action *in personam*, who have given bail for their ship on a counter-claim, cannot get proceedings stayed till the defendants give security to answer the claim (*The Rougemont* [1893], Prob. 275).

Effect of Bail.—As a general rule, bail is the equivalent of the *res* (*The Christiansberg*, 1885, 10 P. D. 155, Fry, L. J.), or is a substitute for it (*The Staffordshire*, 1872, L. R. 4 P. C. 194 and 211); but it does not represent the *res* for all purposes, for “the liability of the owner of the *res* is not confined to the same amount as the liability of the bail” (*The Dictator* [1892], Prob. 304, Jeune, J.). Thus the property may be rearrested before final judgment is given in the action, if the bail falls short of its value; or the owners may be proceeded against *in personam* for the balance of the claim which is unsatisfied by the *res* (*The Dictator*, above, where, in a salvage action, bail was accepted for £5000, and the Court made an award of £7500). Where the bail exceeds the value of the *res*, the bail is only liable to the extent of that value, and not for the amount of damage done (*The Duchesse de Brabant*, 1857, Swa. Ad. 264). For the effect of bail given in a foreign action, on proceedings brought in this country for the same cause of action, see CONCURRENT ACTIONS.

Where Bail is allowed.—This right of the owner of the *res* may be exercised in all actions, even those for the possession of ships (*The Peggy*, 1802, 4 Rob. C. 306, Lord Stowell); and though Dr. Lushington seems to have thought that this was not the practice in such actions (*The Mary v. Alexandra*, 1867, L. R. 1 Ad. & Ec. 335), Sir Robert Phillimore agrees with Lord Stowell: “Even in possessory actions, the Court would always accede to an application to release on bail, where it was possible to do so without defeating the object of the writ” (*The Gauntlet*, 1870, L. R. 3 Ad. & Ec. 19), where a ship, arrested under the Foreign Enlistment Act (see FOREIGN ENLISTMENT), was allowed to be bailed, the Crown consenting, but that consent not being necessary in order to do so (*The Evangelistica*, 1876, 2 P. D. 241). For actions of restraint, the minority of part owners who object to the ship being sent on a particular voyage can obtain bail from the majority for her safe returning (*The Keroula*, 1886, 6 Asp. 23), although they have agreed to the appointment of a particular manager for the ship (*The England*, 1886, 12 P. D. 32). In salvage cases, the property may be detained, notwithstanding bail, till the values are proved or agreed (Order 29, r. 5 (6)).

Amount of Bail.—It may not be required to an amount exceeding the value of the property, however large the claim in the action may be, but it is allowed up to the full value (*The Kalamagos*, 1851, 15 Jur. 885, Dr. Lushington). The owner of the property can, if he chooses, have its value determined by appraisement, which is conclusive, and give bail only for that (see APPRAISEMENT); or that value may be admitted (*The Betsey*, 1804, 5 Rob. C. 295), or proved, all of which equally are conclusive, except in case of a *bond fide* mistake (*The James Armstrong*, 1875, L. R. 4 Ad. & Ec. 380). In actions by shipowners to limit their liability (now under the Merchants' Shipping Act, 1894, s. 503), the bail is limited to the extent of that statutory liability (*The Sisters*, 1876, 1 P. D. 281), interests, and costs (*The Northumbria*, 1869, L. R. 3 Ad. & Ec. 6). The more usual practice is to give bail for the amount claimed in the suit, without attempting to estimate the value of the *res*: “Bail is taken for more or less without ascertaining whether that is the actual value or not, leaving that matter a subject for future consideration” (*The Mellona*, 1848, 6 N. C. 65, Dr. Lushington). But if an exorbitant

amount of bail is demanded, the Court may show its disapproval by depriving the plaintiffs of their costs, or condemning them in the costs incurred by the defendant in giving that amount of bail (*The Earl Grey*, 1853, 1 Sp. Eccl. & Adm. 180; *The Agamemnon*, 1883, 5 Asp. 92; *The George Gordon*, 1884, 9 P. D. 41). Where, as one result of a collision, the plaintiff's vessel becomes subject to a claim for salvage (*q.v.*), the ordinary commission of one per cent., paid by him to his sureties in the salvage action, cannot be recovered by him in the action for damages by collision, as part either of his costs or damages (*The British Commerce*, 1884, 9 P. D. 128). But where the ship has been, without proper cause, arrested by the other party, such commission can be recovered as part of the costs and damages (*The Numida*, 1885, 10 P. D. 158). Where the amount of claim is excessive, the Court may order it and the bail to be reduced (*The Chieftain*, 1863, 32 L. J. Ad. 106; *The St. Olaf*, 1869, L. R. 2 Ad. & Ec. 360, where bail was not allowed to an amount including repairs done to the ship since the arrest). Under the Admiralty Court Act, 1861, s. 33, bail may be taken sufficient to cover not only the judgment of the Admiralty Court, but also that of the Appellate Court (see *The Victoria*, 1876, 1 P. D. 280).

Form and Formalities of Bail.—It can be given before a registrar (either Admiralty or district) or a commissioner for oaths (Order 12, rr. 19, 20, 21). In London the practice is to take it before the latter. A bond is executed by two persons as sureties, to the effect that they submit themselves to the jurisdiction of the Court, and consent that if the party for whom they are bound shall not pay what may be adjudged in the action against him, with costs, execution may issue against them for a sum not exceeding the amount named in the bond (R. S. C. App. A. part ii. No. 13). This form is the same as that in the old practice, no form of bond having been issued under the Admiralty Court Act, 1861 (*The Helene*, 1865, B. & L. 425; *The Victoria*, *ante*). In actions of restraint, a special form of bond is required, *i.e.* only for the value of the minority's shares (*The Robert Dickinson*, 1884, 10 P. D. 15; *The Vivienne*, 1887, 6 Asp. 178). The sureties swear affidavits to justify (*i.e.* that the surety is worth more than the sum in which bail is to be given, after payment of all his debts), and sign the bond in which, under the old practice, their description and address had to be given (*The Tamarce*, 1860, Lush. 28). These documents are then, with notice to the other side, filed in the registry where the action is proceeding. The sureties must not be partners (*The Corner*, 1863, B. & L. 161); and may be examined before the registrar on their affidavits (*The Don Ricardo*, 1880, 5 P. D. 121; *The Fairport*, 1882, 8 P. D. 55). They are not liable till the shipowner makes default, and are discharged, if the parties so agree, or in ordinary cases by long lapse of time, or by the person for whom they are sureties ceasing to be owner of the subject of bail (*The Vivienne*, 1887, 12 P. D. 32).

[Williams and Bruce, *Practice*, pp. 282–291; Roscoe, *Admiralty Practice*, pp. 152–159.]

Bail, Affidavit to hold to.—Arrest on mesne process was made unlawful (12 Geo. I. c. 29) unless an affidavit was filed before the issue of any bailable writ, verifying a cause of action amounting to £20 and upwards (3 Chit., *Gen. Pract.* c. viii.).

Bail Bond.—A bond in favour of the sheriff, executed by a person on his arrest on a *capias ad respondendum* in a personal action, and

by two other persons as his sureties, conditioned for his causing special bail to be put in for him within a limited time in the Court and action in which he was arrested (1 & 2 Vict. c. 110, s. 4; 3 Chit., *Gen. Pract.* 363-367). This was called putting in "bail below." If the condition was not satisfied and notice thereof given to sheriff and plaintiff, the sheriff could sue on the bail bond or assign it to the plaintiff (Bullen and Leake, *Prec. Pl.*, 3rd ed., 69-71).

Bail Court.—The small Court in Westminster Hall in which a single judge sat, under 11 Geo. iv. and 1 Will. iv. c. 70, by which the number of judges in the superior courts of common law was increased by three, and judges were authorised to sit alone for justifying special bail, and certain other matters of practice and procedure, previously dealt with by the Courts in banc, and now disposed of on motion to a Divisional Court or by a judge or master at chambers (see 3 Chit., *Gen. Pract.* c. viii. pp. 11-18).

Bail Piece.—Special bail or "bail above" was put in under a bail bond before a judge in London, or a commissioner for taking bail in the country, by the sureties attending and justifying, *i.e.* proving by affidavit their credit and solvency, and acknowledging the recognisance and giving notice to plaintiff and sheriff so as to vacate the bail bond (3 Chit., *Gen. Pract.* c. viii. p. 373).

The bail piece, a document on parchment, containing a minute of the nature of the recognisance, was verbally acknowledged, signed by the judge, and sometimes also by the sureties, and filed (3 Chit., *Gen. Pract.* c. viii. pp. 377, 378, 382).

Bailee.—See BAILMENTS.

Bailiff.—1. *Of a Lord of a Manor.*—A person appointed by the lord to manage his property and superintend its cultivation.—His precise duties, as also those of the manorial officers, are explained in the treatise called "*Senechaucie*," printed in *Walter of Henley*, a volume published by the English Historical Society in 1890. Sometimes these duties were performed by officials having other titles, and sometimes the bailiff of a manor performed the same duties as the bailiff of a franchise or liberty.

2. *Of a Franchise or Liberty.*—A person who executed writs and processes, and empannelled juries within the liberty. He was usually remunerated by small fees, paid by the persons employing him, out of the proceeds of execution. He was appointed by the lord of the franchise or liberty. See FRANCHISES; LIBERTIES.

3. *Of a Sheriff.*—Persons employed for the same purposes as the bailiffs of a liberty, but within a county. The sheriff is responsible for the trespasses and misdemeanour of his bailiffs, and they are therefore bound to him in an obligation, with sureties, for the proper execution of their office, and are called *bound* bailiffs. There are also certain persons called *special* bailiffs; these are appointed by the sheriff at the request of a party to a suit for the purpose of executing a particular process. A sheriff is not responsible for the trespasses and misdemeanours of a special bailiff. See SHERIFF.

4. Bailiffs of County Court.—By the County Court Acts, 1888, it is provided that for every County Court there shall be one or more high bailiffs, appointed by the judge and removable by the Lord Chancellor; and every person so appointed is empowered to appoint such a number of assistant-bailiffs as shall be allowed by the judge, and to dismiss them; but an assistant-bailiff may also be suspended or dismissed by the judge (s. 33). His duties are to serve all summonses and orders, and, with some exceptions, to execute all warrants, precepts, and writs issued out of the Court, but every high bailiff is responsible for all the acts and defaults of himself and his assistants, in like manner as a sheriff is responsible for the acts and defaults of himself and his officers (s. 35). Every bailiff who shall, by neglect or connivance or omission, lose the opportunity of levying any execution is answerable to the person aggrieved (s. 49). No action can be brought against any bailiff for any act done in obedience to an order of the Court without six days' notice (s. 54). Any warrant to a bailiff to give possession of a tenement justifies him in entering upon the premises named in the warrant, and giving possession, so long as the entry be made between the hours of nine A.M. and four P.M. (s. 142). A high bailiff may interplead where any claims are made to or in respect of any goods taken in execution (s. 157). The judge may authorise any of the high bailiff's assistants to act as brokers or appraisers for the purpose of selling goods taken in execution (s. 159). By the Law of Distress Amendment Act, 1888, no person may act as a bailiff to levy any distress for rent unless he is authorised to act as a bailiff by a certificate in writing under the hand of a County Court judge. See COUNTY COURTS.

Bailiff Errant.—A sheriff's bailiff appointed to execute writs and process in all parts of the county.

Bailiwick.—The district under the jurisdiction of a bailiff, and also a county with respect to the jurisdiction of a sheriff.

Bailments.—Bailment is the general name applied to a class of contracts of which the common element consists in the delivery by one person (the bailor) to another person (the bailee) of the possession of chattels, either to be delivered by the bailee to a third person, or to be re-delivered to the bailor when the purpose of the bailment is at an end. The purpose of the bailment is the leading fact which determines the mutual rights and liabilities of bailor and bailee; and as such it affords the basis of the commonly accepted classification of bailments.

The possession intended by the definition must be distinguished from the bare custody or physical detention of a servant; for a servant who has the custody of his master's property, as servant, has not possession of that property. But constructive delivery is sufficient to satisfy the definition. When an owner in possession of goods sells them to another, but, instead of actually delivering them to the purchaser, agrees to retain possession of them on his behalf, there is a complete contract of bailment; his possession as owner being converted by the agreement into a possession as bailee for the purchaser (*Castle v. Szwed*, 1861, 6 H. & N. 828). In the same way, if a person sells to another goods which are in the possession of a warehouseman, the warehouseman, by attorning to the purchaser, becomes a bailee for him.

Preliminary Distinctions.—It is desirable to notice at the outset some fundamental distinctions which constantly recur in the cases, and upon one or other of which important principles depend. *First*, A bailment may be either gratuitous or for reward,—a distinction which affects the degree of diligence which the law exacts from a bailee. It is obviously reasonable that a person who undertakes to keep a chattel for another, in consideration of a money payment, should be bound to exercise greater care than one who agrees to do so as a mere friendly service. There is, however, an ambiguity in the term “gratuitous bailment,” since it may mean a bailment for the sole benefit of the bailor, or a bailment for the sole benefit of the bailee. *Secondly*, A bailment may be a simple bailment, in which the bailee acquires only the possession of the chattel; or it may confer on the bailee a *special property* or interest in the chattel, by virtue of which he has a right to retain possession of it for a time as against his bailor. This distinction is important with reference to the right to maintain an action at law in respect of the chattel. The typical instances of a special property are the contracts of pledge and hiring: when chattels are pledged as security for a debt, the pledgee has a special property until the money is paid or tendered; and when chattels are let to hire for a term, the hirer has a special property until the owner's right to resume possession arises, according to the terms of the agreement. So, when a bill of sale is given in security for the payment of money, the grantor has a special property in the chattels, or a right to retain possession until the happening of some event which entitles the grantee to take possession (see s. 7 of the Bills of Sale Act, 1882). A contract of pledge or hiring is determined by a wrongful act of the pledgee or hirer, which amounts to a repudiation of the bailment. *Thirdly*, A bailment for a specific and limited purpose must be distinguished from a general bailment. If a horse is let on hire for riding, but not for jumping, it is an actionable wrong to use it for jumping so that it is injured (*Burnard v. Haggis*, 1863, 14 C. B. N. S. 45). If a pledgee re-delivers the goods to the pledgor generally, he relinquishes his right; but he may re-deliver them to the pledgor for a limited purpose without losing his right,—as where he entrusts them to the pledgor, as his agent, to be sold on his behalf (*North-Western Bank v. Poynter*, 1894 [1895], App. Cas. 56). A bailee, who is entitled to the temporary possession of a chattel, and delivers it back to the bailor for a special purpose, may, after the purpose is satisfied and during his temporary right, maintain trover for it against the bailor (*Roberts v. Wyatt*, 1810, 2 Taun. 268; 11 R. R. 566). But, in such a case, if the bailor deals with the chattel in a manner altogether inconsistent with the limited purpose, the sub-bailment is determined, and the bailee is remitted to his original right of possession (see *Nyberg v. Handelsaar* [1892], 2 Q. B. 202). *Fourthly*, A bailment may be either a general bailment, in which the rights and liabilities of the parties are left to be ascertained by the common law; or it may be a bailment on special conditions, where the legal rights of the parties are varied by express agreement. Thus, a warehouseman who receives goods for safe custody may make himself liable as an insurer by expressly warranting their safety; or, on the other hand, he may receive them subject to a condition that, in case of loss by negligence, his liability is to be limited to a particular sum. *Lastly*, Though the law of bailments rests upon the distinction between property and possession, and it is sometimes said that the bailor has the property and the bailee the possession, it is not at all necessary that the legal property should be in the bailor. A mere finder of property, who has no title, may bail it to another; and a bailee may, in some cases, create a sub-bailment between

himself and a third person, or even between himself and the original bailor. Such expressions merely import that a bailor must have a title relatively prior and paramount to that of the bailee,—in other words, a right of possession out of which the right of possession of the bailee may be derived. From this it follows, on the one hand, that the bailee, having accepted possession from the bailor, is generally estopped from disputing his title; and, on the other hand, that a bailee cannot, as against the real owner, have a better title than his bailor.

Classification of Bailments; Rights and Liabilities of Bailor and Bailee inter se.

The classification of bailments which is generally adopted is that of Lord Holt, whose judgment in the celebrated case of *Coggs v. Bernard*, 1704, 2 Raym. (Ld.) 909; 1 Smith's L. C. 167, forms the starting-point of the modern law of bailments. It is convenient to discuss the mutual rights and liabilities of bailor and bailee by following this classification, and noting the principal modern decisions under the respective statements of Lord Holt. The six kinds of bailments are: *Depositum*, *Commodatum*, *Locatio et conductio*, *Vadium* (pawn or pledge), *Locatio operis faciendi*, and *Mandatum*.

I. *Depositum*.—"A bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor," and "where the bailee is not to have any reward."—In this case, says Lord Holt, "the bailee is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. . . . Such a bailee is not chargeable without an apparent gross neglect. . . . If the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect."

The defendant, a coffee-house keeper, with whom the plaintiff had deposited a sum of money for safe custody, put it in his cash-box in the tap-room, which had a bar in it and was open on Sunday, though the other parts of the house were not. The cash-box was stolen on a Sunday. The jury were directed that it did not follow, from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and that that fact afforded no answer if they believed that the loss occurred from gross negligence. The jury having found a verdict for the plaintiff, the Court refused to set it aside (*Doorman v. Jenkins*, 1834, 2 Ad. & E. 256). The plaintiff deposited with a bank, as gratuitous bailees, a strong box containing securities, of which he retained the key. The box was placed in the strong room where the securities of the bank were kept, and to which the cashier of the bank had access. The cashier abstracted some debentures from the box, and absconded. In an action against the bank it was held, by the Colonial Court and the Privy Council, that there was no evidence of gross negligence, for which alone the bank, as gratuitous bailees, could be held liable (*Giblin v. McMullen*, 1868, L. R. 2 P. C. 317).

A person cannot be made liable as a bailee without his consent. If goods are sent to a person without his knowledge or consent, and without any previous communication with him, there is nothing to raise a contract of bailment, and the recipient is under no liability for the safe custody of the goods (*Lethbridge v. Phillips*, 1819, 2 Stark. N. P. 544; *Howard v. Harris*, 1884, C. & E. 253). When chattels are brought by one person upon premises in the occupation of another, the question whether possession has been given to the latter, so as to create a contract of bailment, is one of fact (see *Ancona v. Rogers*, 1876, 1 Ex. D. 285; *Newwith v. Over Darwen*).

Industrial Society, 1894, 63 L. J. Q. B. 290). For a case where a restaurant-keeper has been held liable for the loss of an overcoat entrusted by a customer to a waiter, see *Ullzen v. Nicols*, 1893 [1894], 1 Q. B. 92.

A depositary has no implied right to use the thing entrusted to him, but such a right may be expressly given. When money is handed by one man to another for safe custody, with permission to use it in his business, the depositary stands in a fiduciary position, and the transaction must be distinguished from a loan or debt (*In re Tidd*, *Tidd v. Overell* [1893], 3 Ch. 154).

II. *Commodatum*.—"When goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called *commodatum*, because the thing is to be restored *in specie*." In this case, says Lord Holt, "the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them; so as if the bailee be guilty of the least neglect he will be answerable: as if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. . . . But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves occasion to steal the horse."

The borrower must not deviate from the conditions of the loan. Thus, in an old case, it was held that the defendant, who had borrowed a horse from the plaintiff to ride, was not justified in allowing his servant to ride it, the permission being in the nature of a licence not communicable to another (*Bringloe v. Morrice*, 1676, 1 Mod. 210). On the other hand, where a horse was for sale, and the agent of the vendor lent it to A. for the purpose of trying it, A. was held to be justified in putting a competent person upon the horse to try it, there being an implied authority to do so (*Camoy's v. Scurr*, 1840, 9 Car. & P. 383).

As a borrower in point of law represents himself to the lender as a person of competent skill to take care of the thing lent (*per* Parke, B., *Wilson v. Brett*, 1843, 11 Mee. & W. 113), the lender is taken to represent that, so far as he is aware, the borrower may safely make use of the chattel for the purpose intended. This principle is applied where the borrower sues the lender for damage resulting directly from the defective condition of the chattel lent. See *Blakemore v. Bristol and Exeter Ry. Co.*, 1858, 8 El. & Bl. 1035, and *MacCarthy v. Young*, 1861, 6 H. & N. 329, where personal injuries were sustained through the defective condition of a crane and a scaffold respectively. In the former case, Coleridge, J., delivering the judgment of the Court of Queen's Bench, stated the law in terms which were adopted by the Court of Exchequer in the second case. "It may, we think, be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower therefore is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use,

he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. . . . This is so consonant to reason and justice that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? . . . By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him."

III. *Locatio et conductio* (*Lending for Hire*).—"When goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*."—"In this case," says Lord Holt, "the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired." But more modern authorities do not place a hirer on the same footing as a borrower; the modern rule is, that a hirer is bound to exercise ordinary diligence, that is, such a degree of care as a prudent man would take of his own goods.

When the hirer of a horse, instead of calling in a veterinary surgeon, prescribed for it himself so improperly that the horse soon after died in great agony, he was held responsible for the loss (*Dean v. Keate*, 1811, 3 Camp. N. P. 4, 13 R. R. 735). A Cambridge undergraduate hired a mare for a ride on the road, being told specifically that she was not let for jumping; having, nevertheless, lent the mare to a friend who put her to a fence so that she was transfixcd by a stake and killed, the hirer, though an infant, was held liable for the wrong done (*Burnard v. Haggis*, 1863, 14 C. B. N. S. 45).

If damage is caused to a stranger by the negligence of the hirer's servants, it is of course the hirer, not the owner, who is liable; and it makes no difference that the owner's name and address are affixed to the chattel (a traction engine) under statutory provision, *i.e.* the Locomotives Act, 1865, s. 7 (*Smith v. Bailey* [1891], 2 Q. B. 403).

The hirer may be liable to the bailor for damage caused to the chattel by an act of his servant in circumstances which would not render him liable to a stranger. The defendant had hired a carriage and horse from the plaintiffs. The defendant's coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction. While he was thus engaged, the carriage and horse were injured, owing to the coachman's negligent driving. Held, that there had been a breach of the defendant's contract as bailee, for which he was liable (*Coupe Co. v. Maddick* [1891], 2 Q. B. 413).

As regards the duty of the bailor to the bailee, with reference to defects in the chattel let out for hire, it has been decided that he is an insurer, not against all defects, but against all defects which care and skill can guard against. The duty of a person who lets out carriages is "to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if while the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in *Christie v. Griggs*, 1809, 2 Camp. N. P. 79, 11 R. R. 666, and as the railway company did in *Readhead v. Midland Ry. Co.*, 1869, L. R. 4 Q. B.

349, he will not be liable; but no proof short of this will exonerate him" (Lindley, J., *Hyman v. Nye*, 1881, 6 Q. B. D. 685).

See further, as to the rights and duties of hirers, and especially as to the hire-purchase system, **HIRING AGREEMENT**.

IV. *Vadium (Pawn or Pledge)*.—"When goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a pawn or a pledge."—"In effect," says Lord Holt, "if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. . . . The law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss."

In accordance with this statement, it seems that at common law a pawnbroker is not liable for damage to, or loss of, the chattels by accidental fire; but that when the chattels have been stolen by burglars, the fact that the premises had been left unprotected for twenty-four hours is sufficient evidence of negligence to render the pawnbroker liable (see *Ex parte Cording*, 1832, 4 Barn. & Adol. 198; *Syred v. Carruthers*, 1858, El. B. & E. 469; *Shackell v. West*, 1859, 2 El. & El. 326. These cases were decided under a repealed statute, the words of which, "default, neglect, or wilful misbehaviour," do not, however, enlarge the common-law liability).

See further **PAWN**; and as to the statutory provisions now applicable to pawnbrokers, see **PAWNBROKER**.

V. *Locatio operis faciendi*.—"When goods or chattels are delivered to be carried, or something is to be done about them, for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them."—In this case a distinction is drawn between a person exercising a public employment and a private person.

(a) A person exercising a public employment for reward (*e.g.* a common carrier) is, says Lord Holt, "bound to answer for the goods at all events. . . . The law charges this person thus entrusted to carry goods, against all events, but acts of God and of the enemies of the King. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered." On this subject see **CARRIER**, **INNKEEPER**; and as to the historical origin of the special liability attaching to carriers by the common law, see *Nugent v. Smith*, 1875, 1 C. P. D. 19, 423; Holmes on the *Common Law*, pp. 180 *et seq.*

(b) A private person acting as a bailee for hire is not subject to so strict a rule of liability. "Though a baily is to have a reward for his management," says Lord Holt, "yet he is only to do the best he can. And if he be

robbed, etc., it is a good account. . . . If he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. . . . The true reason of the case is, it would be unreasonable to charge him with a trust, further than the nature of the thing puts it in his power to perform it." The duty of bailees of this class has been recently defined by the Privy Council, as follows:—Bailees for hire are "under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation includes, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks are imminent or have actually occurred" (*Brabant v. King* [1895], App. Cas. 632).

This principle may be illustrated by the following examples:—

An agister of cattle does not insure their safety; but if they are killed or injured through his negligence, he is liable; as when they are lost through the fences being kept in such an improper state that the agister, if he took proper care, could not have been ignorant of it (*Broadwater v. Blot*, 1817, Holt 547, 17 R. R. 677; explained in *Searle v. Laverick*, 1874, L. R. 9 Q. B. 122). Where a banking company accepted a deposit of railway share certificates for safe custody on behalf of a customer, and undertook to receive the dividends for him in consideration of a small commission, they were held to be bailees for reward of the certificates. The company kept the certificates, with their own securities, in a strong box in the manager's room, of which box the manager kept the key. No record was kept of securities in their custody. The Lords Justices held that the company were guilty of negligence in allowing their manager to have unrestricted control over the securities (*In re United Service Company*, 1871, L. R. 6 Ch. 212). The defendant, a livery-stable keeper, with whom the plaintiff's carriages had been deposited for safe custody for reward, lodged them in a shed which had been erected for him by an independent contractor. The shed was blown down by a high wind, and the carriages injured. The defendant having been ignorant of any defect in the shed, it was held that if he had exercised, in the employment of the builder, such care as an ordinary careful man would use, he was not liable for damage caused by the carelessness of the builder, of which he had no notice. A depositary for hire must take reasonable care that any building in which the chattel is deposited is in a proper state, so that the chattel may be reasonably safe in it; but there is no implied warranty or obligation that the building is absolutely safe (*Searle v. Laverick*, 1874, L. R. 9 Q. B. 122). The Queensland Government, as bailees for hire, stored explosive goods belonging to the plaintiffs in sheds near the water's edge, and the goods were destroyed by an exceptionally high flood. In these circumstances, the Privy Council held that two questions of fact arose—(1) Whether the officials of the Government had failed to exercise due care and skill in storing the goods at so low a level; and (2) Whether, on the advent of the flood, they failed to take reasonable and proper measures for saving the whole or any part of the goods from destruction (*Brabant v. King* [1895], App. Cas. 632). The Privy Council also held that the bailors were entitled to rely upon the care and skill of their bailees, and rejected the contention that, as the bailors had had an opportunity of observing certain defects in the storehouse, they must be taken to have agreed that any risk of injury to their goods, which might possibly be

occasioned by those defects, should be borne by them, and not by the bailees (*Brabant v. King, supra*).

Though a bailee for hire is not liable for accidental loss or destruction, not resulting from his negligence, yet the onus is on him to prove that he has taken reasonable and proper care (*Mackenzie v. Cox*, 1840, 9 Car. & P. 632). Thus, if an attorney is sued in detinue for a deed which has been entrusted to him by a client, it is no answer for him to say simply that he has lost it (*Reeve v. Palmer*, 1858, 5 C. B. N. S. 84).

A bailee for hire may receive goods for safe custody upon special conditions,—as in the common case of a cloak-room at a railway station. In such a case, if the bailees set up a special condition, restrictive of their liability, contained in a ticket, receipt, or voucher handed to the bailor, it is a question of fact “whether the bailees did what was reasonably sufficient to give the bailor notice of the conditions on which they consented to receive the goods” (*Parker v. South-Eastern Railway Company*, 1877, 2 C. P. D. 416).

If a person who has contracted to warehouse goods at a particular place, chooses to warehouse them at another place not authorised by the bailor, and they are there destroyed without any negligence on his part, he is liable to the bailor for breach of contract; and if the bailor loses the benefit of an insurance effected by him, by reason of the place of deposit being wrongly described in the policy, the damage is not too remote to be recovered (*Lilley v. Doubleday*, 1881, 7 Q. B. D. 510).

Where a bailee has expended his labour and skill in the improvement of a chattel delivered to him for that purpose, he has a lien for his charges. Thus, an artificer to whom goods are delivered for the purpose of being worked up into form, or a farrier by whose skill an animal is cured of a disease, or a horsebreaker by whose skill it is rendered manageable, have liens on the chattels in respect of their charges (*Bevan v. Waters*, 1828, 1 Moo. & M. 236; *Scarfe v. Morgan*, 1838, 4 Mee. & W. 270). But an agister has no lien at common law (*Jackson v. Cummins*, 1839, 5 Mee. & W. 342), though a lien in the nature of a special property may be given by express agreement (*Richards v. Symons*, 1845, 8 Q. B. 90). If a bailee, having a lien on a chattel, chooses to keep the chattel for the purpose of enforcing his lien, he cannot add to his lien a further charge for keeping the chattel till the debt is paid (*Somes v. British Empire Shipping Co.*, 1860, 8 H. L. 338).

See also AGISTMENT; AUCTIONEER; FACTOR; LIEN; WAREHOUSEMAN; WHARFINGER.

VI. *Mandatum*.—“When there is a delivery of goods or chattels to somebody who is to carry them, or do something about them gratis, without any reward for such his work or carriage.”—In this case, says Lord Holt, “a neglect is a deceit to the bailor. For when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. . . . The owner’s trusting him with the goods is a sufficient consideration to oblige him to a careful management.”

In *Coggs v. Bernard*, an action on the case, the declaration alleged that the defendant “had undertaken safely and securely to take up several hogsheads of brandy, then in a certain cellar in D., and safely and securely to lay them down again in a certain other cellar in Water Lane, the said defendant, and his servants and agents, *tam negligenter et improvide*, put them down again into the said other cellar, that *per defectum curæ*, etc., one of the casks was staved and a great quantity of brandy was spilt.” After not guilty pleaded, and a verdict for the plaintiff, the Court held, on a motion in arrest of judgment, that the declaration was good and the action

well lay, though the defendant was not a common carrier and was to have nothing for the carriage (*Coggs v. Bernard*, 1704, 2 Raym. (Ld.) 909).

The decision in *Coggs v. Bernard* has been the subject of two traditional comments—(1) It has been said that Lord Holt ought to have classed *mandatum* under the same head with *depositum*, the liability of the bailee in these cases being generally the same; (2) It has been said that in *Coggs v. Bernard*, where there was no question of gross negligence, the special promise of the defendant to effect the removal safely bound him to stricter diligence than a simple promise would have done. The truth is, that on these points the judgments are far from distinct. The fact that Lord Holt distinguished *mandatum* from *depositum* is partly accounted for by historical reasons. In *depositum*, the remedy of the bailor was detinue or trover, while in *Coggs v. Bernard* the plaintiff declared in assumpsit, charging a misfeasance; and the Court were embarrassed by the theoretical difficulty of establishing a *positive* duty, or a duty to do an act carefully, when there was no consideration to support a duty to do it at all. As regards the second point, it is clear that a similar special promise might be made by a depositary. But it is difficult to avoid the conclusion that Lord Holt, apart from the special words of the undertaking, put the liability of a mandatory much higher than that of a depositary. In more recent times it has been held that the words "safely and securely" do not necessarily import absolute assurance, but are to be construed with reference to the character of the party and the nature of the bailment, or, in other words, with reference to the degree of care which under the circumstances the law requires of the bailee (*Ross v. Hill*, 1846, 2 C. B. 877). And the law now is, that a mandatory is under the same liability as a depositary: when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, the bailee is only liable to an action on proof of gross negligence (*Shiells v. Blackburne*, 1789, 1 Black. H. 158; 2 R. R. 750). This principle is not limited to bailees, but extends generally to other forms of gratuitous agency.

The defendant undertook voluntarily and without compensation to enter at the custom-house some cut leather for export. He entered it, along with similar goods of his own, as wrought leather instead of dressed leather; and in consequence of this mistake the goods were seized. In an action to recover compensation for the loss, the plaintiff had a verdict; but the Court set it aside and granted a new trial, on the ground that the defendant had not been guilty either of gross negligence or of fraud. But Lord Loughborough, C. J., in laying down the rule that a gratuitous bailee is only liable for gross negligence, added: "But if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If, in this case, a shipbroker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries" (*Shiells v. Blackburne*, *supra*). So, where the defendant, a stage-coachman, received a parcel belonging to the plaintiff to be carried gratis, and it was lost on the road, Lord Tenterden, C. J., directed the jury that the defendant was liable, if there was great negligence on his part (*Beauchamp v. Powley*, 1831, 1 M. & Rob. 38).

The owner of a horse entrusted it to the defendant for the purpose of being shown to an intending purchaser. The defendant negligently rode the horse on to a cricket-field, where the ground was slippery, and in con-

sequence the horse fell and was injured. The defendant, though a gratuitous bailee, was held liable, on the ground that he was a person conversant with and skilled in the management of horses, and that he had omitted to use such skill as he possessed (*Wilson v. Brett*, 1843, 11 Mee. & W. 113).

Degrees of Negligence.—A useful classification of bailments, according to the degree of responsibility incurred by the bailee, results from a slight modification of the classification of Lord Holt. The six classes of Lord Holt may be rearranged under three general classes. "The first of these is, where the bailment is for the benefit of the bailor alone; this includes the cases of *mandates* and *deposits*, and in this the bailee is liable only for gross negligence. The second is, where the bailment is for the benefit of the bailee alone; this comprises *loans*, and in this class the bailee is bound to the very strictest diligence. The third is, where the bailment is for the benefit both of bailor and bailee; this includes *locatio rei*, *vadium*, and *locatio operis*, and in this class an ordinary and average degree of diligence is sufficient to exempt the bailee from responsibility" (1 Smith's L. C. p. 228).

The term "gross negligence," which is used as a short and convenient mode of describing the degree of responsibility attaching to a gratuitous bailee, is in some respects open to objection. The real question in every case is, whether the bailee has failed to exercise due diligence, the degree of diligence to which he is bound depending in each case on the circumstances and purpose of the bailment. There would, however, be no practical gain from the substitution of a positive for a negative expression (see the observations of Lord Chelmsford in *Giblin v. McMullen*, 1868, L. R. 2 P. C. 317, at p. 336, and the authorities there cited).

Liabilities of Chattels in the possession of a Bailee.—While goods or chattels are in the possession of a bailee they are subject to certain liabilities, which must be briefly indicated. They are in general subject to distress for rent. But an exemption exists, for the benefit of trade, in favour of things delivered to a person exercising a trade, to be kept, carried, wrought, or manufactured in the way of his trade (*Simpson v. Hartopp*, 1744, Willes, 512; *Muspratt v. Gregory*, 1838, 1 Mee. & W. 633, in Ex. Ch. 3 Mee. & W. 677). Thus, goods consigned to a factor, broker, or commission agent for sale in the way of his business, are privileged from distress (*Gilman v. Elton*, 1821, 3 B. & B. 75; 23 R. R. 567; *Findon v. McLaren*, 1845, 6 Q. B. 891). So are goods delivered to an auctioneer to be sold on premises occupied by him (*Adams v. Grane*, 1833, 1 Cr. & M. 380; *Williams v. Holmes*, 1853, 8 Ex. 861), though the privilege does not exist if the goods are on premises which are not in the auctioneer's occupation (*Lyons v. Elliott*, 1876, 1 Q. B. D. 210). Goods deposited with a wharfinger or warehouseman (*Thompson v. Mashiter*, 1823, 1 Bing. 283, 25 R. R. 624), or stored at a furniture warehouse (*Miles v. Furber*, 1873, L. R. 8 Q. B. 77), or pledged with a pawnbroker (*Swire v. Leach*, 1865, 18 C. B. N. S. 479), are privileged. Goods or materials in the hands of a workman, to be wrought, manufactured, or repaired, are privileged, provided there has been a delivery, actual or constructive, for the purposes of trade (see *Clarke v. Millwall Dock Co.*, 1886, 17 Q. B. D. 494); but there is no similar privilege as regards tools or implements of trade delivered to a workman or trader for use in his business (*Joule v. Jackson*, 1841, 7 Mee. & W. 450). Goods entrusted to a carrier are also privileged, not only on the carrier's premises, but on any premises where they may be during the carriage (*Gisbourn v. Hurst*, 1710, 1 Salk. 249).

The chattels are not in general liable to be taken in execution under a judgment against the bailee. But under a *fi. fa.* against a pawnbroker, the sheriff may seize in execution all goods which have been pledged more than

twelve months and a week, and are therefore irredeemable; and he has a right to hold the redeemable pledges by way of deposit, to retain for the execution creditor any money paid for redemption, and to sell them when the time for redemption has expired (*In re Rollason*, 1887, 34 Ch. D. 495). As to the right of the sheriff to sell the interest of the hirer in goods let under a hiring agreement, see *Dean v. Whittaker*, 1824, 1 Car. & P. 347; *Duffill v. Spottiswoode*, 1828, 3 C. & P. 435; *Lancashire Waggon Co. v. Fitzhugh*, 1861, 6 H. & N. 502.

The chattels may also be in the order and disposition of the bailee in his trade or business, so as to pass to his trustee in bankruptcy under the reputed ownership clause (s. 44 of the Bankruptcy Act, 1883). But this clause may be excluded by evidence of a custom of trade, affecting a particular kind of chattels, and so generally known that persons dealing with the bailee could not legitimately infer that he was the owner of such chattels in his possession (see *Ex parte Watkins*, *In re Couston*, 1873, L. R. 8 Ch. 520; *Ex parte Wingfield*, *In re Florence*, 1879, 10 Ch. D. 591; *Ex parte Reynolds*, *In re Barnett*, 1885, 15 Q. B. D. 169).

(See DISTRESS; EXECUTION; REPUTED OWNERSHIP.)

Right to Sue; Measure of Damages.—The right of a bailor or a bailee to maintain an action in respect of the chattels has been the subject of numerous decisions, ancient and modern; but the law on this point has undergone many changes, and cannot even now be regarded as finally settled.

It has always been considered that a bailee is entitled to sue a stranger for an injury to the chattel in his possession, and this, whether he has a special property in the chattel or not, on the general principle that possession is sufficient title against a wrongdoer. The same proposition holds good of a mere finder, who can defend his possession against all the world but the true owner. Thus a gratuitous bailee of a horse was held to have such a property in it, as to maintain an action on the case against a neighbour for not repairing fences, whereby the horse was killed (*Rooth v. Wilson*, 1817, 1 Barn. & Ald. 59, 18 R. R. 431). So a person who had hired a carriage for a day was held entitled to recover for an injury caused by the negligent driving of the defendant, the plaintiff being the "proprietor" of the carriage for the purpose of the action (*Croft v. Alison*, 1821, 4 Barn. & Ald. 590). So the hirer of chattels under a written agreement was held entitled to sue a wrongdoer in trover, without producing the written agreement, which was unstamped (*Burton v. Hughes*, 1824, 2 Bing. 173). These cases appear to be still law, subject, however, to the effect of a recent decision as to the measure of damages (see *Ciaridge's case*, *infra*).

If the bailee, having a special property in the goods, sued the bailor in trespass or trover, for wrongfully seizing and selling the goods, it was held that he could not recover the whole value of the goods, but only the value of his limited interest (*Brierly v. Kendall*, 1852, 17 Q. B. 937).

As regards the right of the bailor to sue, a distinction has been recognised for fully a century.

1. If the bailee had a special property in the chattels, as in the case of a hiring agreement or a pledge, the bailor could not sue in trespass, or trover or detain, because he had temporarily parted with the right to possession, and in these actions it was necessary for the plaintiff to prove either possession or an immediate right to possession (*Ward v. Macauley*, 1791, 4 T. R. 489; *Gordon v. Harper*, 1796, 7 T. R. 9, 4 R. R. 369; *Pain v. Whittaker*, 1824, Ry. & M. 99; *Bradley v. Copley*, 1845, 1 C. B. 685). It was, however, held that the owner of a chattel, which was out on hire

for an unexpired term, could maintain an action on the case against a stranger, a permanent injury to the chattel being in the nature of an injury to the owner's reversion (*Hall v. Pickard*, 1812, 3 Camp. N. P. 187; *Mears v. London and South-Western Ry. Co.*, 1862, 11 C. B. N. S. 850). And as late as 1849, in *Manders v. Williams*, *infra*, Parke, B., expressed the opinion that cases such as *Gordon v. Harper* and *Bradley v. Copley*, *supra*, might, with propriety, have been decided otherwise.

2. If the bailment was determinable at the option of the bailor, so that he had an immediate right to possession, he could sue. Thus, it was held by Lord Ellenborough, C. J., that the owner of a chaise, who had permitted a friend to use it, had constructive possession and could maintain trespass against a stranger for an injury to it during such use (*Lotan v. Cross*, 1810, 2 Camp. N. P. 464). In actions of trover by a bailor against a wrongdoer, it was laid down that either the bailor or the bailee could maintain the action (Parke, B., *Nicolls v. Bastard*, 1835, 2 C. M. & R. 659; *Manders v. Williams*, 1849, 4 Ex. 339; see Williams, J., *Mears v. London and South-Western Ry. Co.*, *supra*); and it was added that "whichever first obtains damages it is a full satisfaction," and that "a recovery by one ousts the other of his action" (see *Nicolls v. Bastard*, *supra*; Bac. Abr., Trover, C.). These expressions would be unmeaning, if they did not imply that the whole damages could be recovered either by the bailor or by the bailee. Hence, it was supposed that if a bailee recovered the whole value of the chattel, he held the residue over his own damage in trust for the bailor; and the rule that a bailee, such as a warehouseman, has an insurable interest, and may recover the whole value in case of loss by fire, accounting to the bailor for the surplus over his own damage, seems to have been historically an extension of this supposed rule (see the argument of Mellish in *Waters v. Monarch Insurance Co.*, 1856, 5 El. & Bl. 870).

It has, however, been recently decided by Hawkins and Wills, JJ., that where a bailee is not "liable over" to his bailor, he is not entitled to recover the whole amount of the depreciation in the chattel caused by the wrongful act of a third party. He can only recover such damages as he has himself sustained. For damages over and above, the bailor must sue (*Claridge v. South Staffordshire Tramway Co.* [1892], 1 Q. B. 422). Apart from the principle laid down in this case, the decision seems in one respect open to criticism. The plaintiff was an auctioneer, to whom the horse in question had been sent for sale, with permission to use it until the sale, and it was injured while being driven in the plaintiff's carriage. The direction of the County Court judge, which was upheld in the Divisional Court, was that the plaintiff could recover damages for the injury to his carriage, but not for the injury to the horse. But it is conceived that the permission to use the horse until sale gave the plaintiff a special property or interest in it, and if the injury rendered his use of the horse less advantageous, he ought to have recovered some damages for that. In a more recent case, the plaintiff, a London agent, was in possession of goods and samples which had been sent to him for sale, on the terms that, if any goods remained unsold at the end of the season, they were to be returned to his principal in Germany. The agreement was silent about any liability attaching to the agent in respect of the safe custody of the goods or samples. The goods were injured by the negligence of the defendants' servants, in permitting water to flow upon them from an upper floor in the building. Kennedy, J., held that, on the principle of *Claridge's case*, *supra*, the plaintiff had no sufficient right of ownership in the goods to entitle him to recover the amount by which their value had been

diminished, but that he was entitled to recover the loss of profits which he had sustained by being deprived of the samples during the remainder of the season (*Brown v. Hand-in-Hand Fire Insurance Society*, 1895, 11 T. L. R. 538).

The principle laid down in *Claridge's case*, *supra*, is not intrinsically unreasonable, and may probably be followed. The learned judges, however, made no serious attempt to deal with the older authorities; and the decision is much more novel than they seem to have supposed. In America the law has been laid down in terms similar to those formerly used in this country (*Woodman v. Nottingham*, 1870, 49 New Hampshire, 387; Sedgwick's *Leading Cases on Measure of Damages*, 685), and though in that case the plaintiff seems to have been liable over to the bailor, under the contract of bailment, the rule was not rested upon that fact. Besides the cases above cited, reference may be made to *Sutton v. Buck*, 1810, 2 Taun. 302, 11 R. R. 585; *Turner v. Hardcastle*, 1862, 11 C. B. N. S. 683; *Swire v. Leach*, 1865, 18 C. B. N. S. 479).

As to the measure of damages in an action by the bailor against the bailee for wrongfully converting the goods, see *Chinery v. Viall*, 1860, 5 H. & N. 288; *Johnson v. Stear*, 1863, 15 C. B. N. S. 330; *Donald v. Suckling*, 1866, L. R. 1 Q. B. 585; *Halliday v. Holgate*, 1868, L. R. 3 Ex. 299; *Mulliner v. Florence*, 1878, 3 Q. B. D. 484; *Henderson v. Williams* [1895], 1 Q. B. 521.

Assignment by Bailor and Attornment by Bailee.—The bailor may assign to another his property or interest in goods or chattels in the bailee's possession. Even in the case of a pledge by the owner of goods, where the pledgee has a special property, the general property remains in the pledgor, and is assignable by him at law; his right is not a mere chose in action (*Franklin v. Neate*, 1844, 13 Mee. & W. 481). As to the assignment of the owner's rights under a hiring agreement, see *HIRING AGREEMENT*.

If the bailee attorns to the title of a *bonâ fide* purchaser by informing him that the goods are now held at his disposal, he is estopped from afterwards setting up any defect in the vendor's title (*Henderson v. Williams* [1895], 1 Q. B. 521). Such an attornment is equivalent to a representation that the property has passed to the purchaser, and the estoppel arises when the purchaser, induced by the representation, alters his position by paying the price to the vendor (*Biddle v. Bond*, 1865, 6 B. & S. 225), or when, but for the representation, he might have recovered back from the vendor the price he has already paid (*Knights v. Wiffen*, 1870, L. R. 5 Q. B. 660). After a transfer or delivery order is presented to the bailee and attorned to by him, he holds for the buyer, but until such attornment there is no sufficient acceptance and receipt by the buyer to satisfy sec. 17 of the Statute of Frauds (*Farina v. Home*, 1846, 16 Mee. & W. 119; *Bentall v. Burn*, 1824, 3 Barn. & Cress. 423; see now sec. 4 of the Sale of Goods Act, 1893). As to evidence of acceptance and receipt, when the bailor has agreed to sell the chattels to the bailee in whose possession they are, see *Lillywhite v. Devereux*, 1846, 15 Mee. & W. 285; *Taylor v. Wakefield*, 1856, 6 El. & Bl. 765).

Determination of Bailment.—When chattels are bailed for safe custody, to be restored when required, a demand is necessary before the bailee can be sued for not delivering them back. But if the bailee has wrongfully converted them, the bailor may elect to sue him for damages for the tort, or for the proceeds of the conversion without any demand. The distinction is of importance with reference to the time from which the Statute of Limitations begins to run (see *Granger v. George*, 1826, 5 Barn. & Cress. 149;

Wilkinson v. Verity, 1871, L. R. 6 C. P. 206; *Miller v. Dell*, 1890 [1891], 1 Q. B. 468; *In re Tidd* [1893], 3 Ch. 154).

If a chattel is bailed by two co-owners the bailee is not liable in trover, if he refuses to deliver it up to one only (*May v. Harvey*, 1811, 13 East, 197, 12 R. R. 322; *Harper v. Godsell*, 1870, L. R. 5 Q. B. 422). If one of two co-owners pledges the chattel for his own debt, the other cannot recover it from the pledgee unless he has a special property or right of possession as against his co-owner (*Nyberg v. Handelaar* [1892], 2 Q. B. 202).

A bailment may be determined by what is equivalent to eviction by title paramount, so that the bailee may set up the *jus tertii* in answer to the bailor's claim for re-delivery (*Biddle v. Bond*, 1865, 6 B. & S. 225). Thus, where A. had deposited goods with B. for the purpose of defeating an execution, and afterwards called on B. to return them, it was held that B. could set up the title of a third person to whom A. had assigned the goods before the deposit; for a re-delivery to the depositor would have rendered him liable in an action of trover by the real owner (*Cheesman v. Exall*, 1851, 6 Ex. Rep. 341). So, if goods have been entrusted to a common carrier by a person having no title, and the real owner demands the goods before the carrier has parted with them, and the carrier delivers them to him, this is a good defence to an action by the bailor against the carrier. "The law," said Willes, J., in delivering the judgment of the Court, "would have protected the defendants against the real owner, if they had delivered the goods in pursuance of their employment, without notice of his claim. It ought equally to protect them against the pseudo-owner, from whom they could not refuse to receive the goods, in the event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a carrier furnishes ample ground for so holding" (*Sheridan v. New Quay Co.*, 1858, 4 C. B. N. S. 618). When the bailor mortgages the chattel subsequent to the bailment, and the mortgagee has the right to demand possession from the bailee and does demand it, the bailee is justified in refusing to give the chattel up to the bailor (*European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, 1861, 30 L. J. C. P. 247). When the bailee is evicted by title paramount, he is not responsible to the bailor for injury sustained by the latter, unless there is a special contract, or he is in some way to blame for the loss (*Ross v. Edwards*, 1895, 73 L. T. 100).

But a bailee cannot set up a *jus tertii* if he accepted the bailment with full knowledge of the adverse claim (see *Ex parte Davies, re Sadler*, 1881, 19 Ch. D. 86), nor is he entitled to set up the *jus tertii* merely because he has become aware of the title of a third person, or because an adverse claim is made upon him, though in the latter case he may be entitled to interplead (*Biddle v. Bond*, 1865, 6 B. & S. 225). When a bailor, who has deposited goods with a warehouseman, has afterwards sold them and received the price, and indorsed the delivery order to the purchaser, he is still entitled to delivery of them on demand, unless the warehouseman can prove that he holds them upon the right and title and by the authority of the purchaser (*Rogers v. Lambert* [1891], 1 Q. B. 318).

A bailment may be determined by the accidental loss or destruction of the chattel bailed. "In all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the thing lent or bailed becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel" (Blackburn, J., *Taylor*

v. Caldwell, 1863, 3 B. & S. 826). Thus, where a ship delivered to a shipwright for repair was destroyed by accidental fire, it was held that the shipwright was not liable for the loss, but could recover from the owner the value of work and materials employed in repairs (*Menetone v. Atharves*, 1764, 3 Burr. 1592).

A bailment is determined by any wrongful act of the bailee which amounts to a repudiation of the contract. Thus, if the hirer of goods wrongfully sells them, the bailment is determined, and the owner may at once maintain an action of trover against even a *bona fide* purchaser (*Cooper v. Willomat*, 1845, 1 C. B. 672); and the same principle applies where a mortgagor in possession under a demise for a term, sells the goods (*Fenn v. Bittleston*, 1851, 7 Ex. Rep. 152). (See BILLS OF SALE; CONVERSION; FACTOR; HIRING AGREEMENT.) At common law, a bailee who was lawfully in possession of goods could not commit the offence of larceny, unless by "breaking bulk" he committed a trespass; but by 24 & 25 Vict. c. 96, s. 3, "whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any other person than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction." See LARCENY.

[See Smith's L. C., i. pp. 167-230; Addison on *Contracts*; Jones on *Bailments*; Story on *Bailments*; Beven on *Negligence*; Dicey on *Parties to an Action*; Holmes on the *Common Law*, Lectures v. and vi.]

Bailor.—See BAILMENTS.

Bakehouse.—Any place in which are baked bread, biscuits, or confectionery, from the baking or selling of which a profit is derived, is a bakehouse, within the meaning of the Factory and Workshop Acts, 1878-1895, sec. 96, sched. iv. pt. 2 (22) of the Act of 1878 (the principal Act), and sec. 141, Public Health (London) Act, 1891. A bakehouse is a workshop, unless it becomes a factory through the use of steam, water, or other mechanical power therein (s. 93, Factory and Workshop Act, 1878, and sched. iv. pt. 2).

BAKEHOUSE (RETAIL).—A retail bakehouse means any bakehouse or place, the bread, biscuits, or confectionery baked in which are not sold wholesale, but by retail, in some shop or place occupied together with such bakehouse (Factory and Workshop Act, 1883, s. 18). By sec. 36 of the Factory and Workshop Act, 1891, the expression retail bakehouse, in the Factory and Workshop Act, 1883, shall not include any place which is a factory within the meaning of the principal Act. The sanitary provisions of secs. 3, 33, 34, 35 of the Factory and Workshop Act, 1878, and sec. 15 of the Factory and Workshop Act, 1883, so far as retail bakehouses are concerned, are enforced by the local authority of the district and not by factory inspectors. For such purpose, the medical officer of health of the local authority has all the powers of an inspector under the Factory and Workshop Act, 1878; Act 1883, s. 17 (1). This provision, as regards London, is now repealed by the Public Health (London) Act, 1891, s. 142.

BAKEHOUSE REGULATIONS ACT, 1863, 26 & 27 Vict. c. 40, was repealed, and replaced by the Factory and Workshop Act, 1878. The Factory and Workshop Acts, 1878-1895, and the Public Health (London) Act, 1891,

now contain the statutory regulations regarding bakehouses. The most important provisions of these enactments are as follow:—

Limewashing, etc.—Sec. 34, Factory and Workshop Act, 1878, as amended by sec. 27 (1), Factory and Workshop Act, 1895, provides for the limewashing, painting, and washing of the interior of all bakehouses at specified times.

Sleeping-Places.—A place on the same level with a bakehouse, and forming part of the same building, must not be used as a sleeping-place, unless it is effectually separated from the bakehouse by a partition extending from the floor to the ceiling, and unless there be an external glazed window of at least nine superficial feet in area, of which at least four and a half are made to open for ventilation (s. 35, Factory and Workshop Act, 1878, as amended by s. 27 (i.), Factory and Workshop Act, 1895).

Underground Places.—By sec. 27 (3) of the Factory and Workshop Act, 1895, a place underground is not to be used as a bakehouse, unless it was so in use on 1st January 1896.

Regulations of Factory and Workshop Act, 1883, 46 & 47 Vict. c. 53, sec. 15, as amended by sec. 27 (2), Factory and Workshop Act, 1895, require that—(1) No water-closet, etc., shall be within or communicate directly with the bakehouse; (2) Any cistern for the bakehouse, to be distinct from any cistern for supplying a water-closet; (3) No drain or pipe for carrying off sewerage matter to have an opening within the bakehouse.

Penalties.—Various fines and penalties are prescribed for contravention of these provisions (see Act of 1878, ss. 35 and 81; Act 1883, ss. 15 and 16).

Age of Employees.—Male young persons above the age of sixteen may be employed in bakehouses between five A.M. and seven P.M., but the Secretary of State may, under special circumstances, permit the employment of such, as if they were no longer young persons (Act 1878, s. 45).

Enforcement of Regulations.—In bakehouses which are “factories,” sanitary supervision is exercised by inspectors of factories, but secs. 34, 35, and 81 of the Factory and Workshop Act, 1878, and secs. 15 and 16 of the Factory and Workshop Act, 1883, which relate to cleanliness, ventilation, and other sanitary conditions, are enforced in respect of every bakehouse which is a “workshop” by the sanitary authority of the district in which the bakehouse is situate, and they are to be the local authority within the meaning of those sections (Public Health (London) Act, 1891, s. 26 (1)).

From 1863 to 1878 the sanitary supervision of all bakehouses was placed in the hands of the local authorities. From 1878 to 1883, in the hands of inspectors of factories. After 1883, supervision of retail bakehouses was restored to the local authority.

See *Bakehouse (Retail)*, *sup.*

Balance of Constitution.—In every State there resides a sovereign authority to do any executive act within the limits of its jurisdiction, to decide any disputed question, to make or abrogate any law. Where this authority is vested in a single person, the government is properly described as an absolute monarchy. Justinian, *e.g.*, as emperor was absolute; he could make any law—*Quod principi placuit, legis habet vigorem*. It is true that he professed to derive his powers from the *lex regia* passed at the beginning of his reign, but this, it need hardly be said, was a mere form. A good Emperor would desire to be considered *juris*

religiosissimus, but his observance of the law was voluntary; *licet enim legibus soluti sumus, attamen legibus vivimus*. These texts of Roman law were freely used by the partisans of monarchy in the Middle Ages. Bracton applies the maxim, *Quod principi placuit, etc.*, to the King of England, and Mr. Maitland conjectures that the famous passage which places the law above the king, was no part of Bracton's original text. But already, in Bracton's time, men were beginning to deny that the king could change the law and custom of the realm, unless with consent of the barons and (in matters which directly concerned them) of the commons. This is now the established rule of our constitution; the sovereign authority of the State is the Queen in Parliament. The authority of Parliament is absolute and transcendent. Coke indeed held that Parliament could not enact anything contrary to the law of God; and Holt said that if Parliament made a man judge in his own case, the Act would be void. But these dicta are inconsistent with the doctrine of sovereignty, as expounded by modern writers. If a judge may declare an Act void, because it is contrary to natural justice, this simply means that the judge's notion of natural justice is to prevail against the opinion of the Legislature. If, then, we say that our constitution is balanced, we mean, not that there is any legal limit to the power of Parliament, but that an unlimited power of legislation is vested in a body composed of three parts, no one of which can alter the law without the consent of the other two. In countries where the ordinary legislature is limited by a written constitution, it is not always easy to determine where (if anywhere) sovereignty resides. Austin and his school hold that the sovereign authority of the United States is the combination of State legislatures, or conventions, which is required to authorise an amendment of the American constitution; but this theory, as Mr. H. Sidgwick has pointed out, involves Austin in the questionable statement that the American people are "in the habit of obedience" to an authority which is called into existence at long intervals, and for limited and temporary purposes. Congress cannot amend the constitution, which is regarded as the fundamental law of the republic. Parliament can amend or change any law; and Mr. Dicey has gone so far as to suggest that there are no fundamental laws of the English realm. It may, however, be questioned whether Parliament can fundamentally alter its own constitution—whether, *e.g.*, the Lords can legally consent to the abolition of their House as a component part of Parliament. It is of course politically possible that the House of Lords may cease to exist, but a jurist might argue that the destruction of a necessary component part of the Legislature is not an act of sovereignty, but the constitution of a new sovereign.

The theory of a balanced government may be connected with the theory of division of powers. Under an absolute government, such as that of France before the revolution of 1789, legislative and executive power are in the same hands, and the executive overrides the judicial authority by acts of State. Montesquieu perceived that the boasted liberty of Englishmen was due to the fact that the three powers were in a great measure independent of one another, and his analysis of the English constitution has furnished a basis for the written constitutions of many modern States.

[Justinian, *Inst.* i. 2, and ii. 17; Montesquieu, *Esprit des Lois*, l. xi. ch. vi.; Maitland, *Bracton's Note-Book*, i. 29. For the doctrine that Acts of Parliament are controlled by the common law, or by the law of nature, see *Dr. Bonham's Case*, 8 Rep. 118; *Day v. Savadge*, 12 Jac. 1, Hob. 87; *City of London v. Wood*, 13 Will. III, 12 Mod. 687. The doctrine is criticised by Willes, J., in *Lee v. Bude and Torrington Ry. Co.*, 1871, L. R. 6 C. P. 582.]

Balance of Power.—A term used in diplomacy to describe such a balancing of the power of States as will secure each against an overwhelming preponderance of any one of them.

"The doctrine of the balance of power," says Lorimer, "has been regarded as embodying the fundamental conception of cosmopolitan organisation ever since the Peace of Westphalia in 1648" (*Law of Nations*, vol. ii. p. 197). . . . "It is a proclamation of *solidarité* within the limits of recognition of the interdependence as opposed to the independence of States" (p. 199).

The first public document which mentions the balance of power is the Treaty of Utrecht (1713), the preamble to which recites that it is entered into "ad formandam stabiliendamque pacem ac tranquillitatem Christiani orbis justo potentiae æquilibrio."

The doctrine has now lost much of its significance in Western Europe, though it still remains among the traditions of diplomacy in the relations of the Great Powers with Eastern Europe and the extreme East.

Balance Order.—In the case of non-compliance by a contributor, in the winding-up of a company, with an order made upon him for a call, another and special order, called a balance order, is made, requiring him to pay what has been found to be due from him within four days after service (Rule 35, The Companies Act, 1862). Such an order may be enforced, like other orders in Chancery, by *fieri facias*, *levari facias*, *elegit*, sequestration, charging order and attachment of debts (sec. 20, Act of 1862, and Order 45, R. S. C. 1883).

A writ of *ne exeat regno* (*q.v.*) may also be issued on motion *ex parte*, to prevent a defaulting contributor from absconding without paying the call. See sec. 18 of the Act for extending the remedies of creditors against the property of debtors, 1 & 2 Vict. c. 110.

By secs. 122 and 123 of the Act of 1862, orders made in England are enforced in Scotland and Ireland, in accordance with the provisions of those sections.

Though a balance order under sec. 120 resembles a judgment in carrying with it the same remedies, there is no merger of the original cause of action.

It is a mere direction given by the Court for the better getting in an asset. But though a balance order for calls made either before or in the winding-up cannot be enforced by action (*Chalk, Webb, & Co. v. Tennent*, 1888, 36 W. R. 263), nor made the foundation of bankruptcy proceedings (*Ex parte Whinney*, 1884, 13 Q. B. D. 476, and *Ex parte Grimwade*, 1886, 17 Q. B. D. 357), yet an action may be maintained in respect of the calls as an original debt (*Westmoreland Slate Co. v. Fielden* [1891], 3 Ch. 15). Notwithstanding a balance order, an executor may still retain his own debt out of his testator's estate who was liable as a contributor (*International Marine, etc., Co. v. Hawes*, 1885, 29 Ch. D. 934). See EXECUTORS AND ADMINISTRATORS (*Retainer*).

Balance-Sheet. See COMPANY.

Baldachino (otherwise *Baldachin* or *Baldaquin*).—A canopy generally (from *Baldacco*, the Italian form of Bagdad), especially a durable canopy,

sometimes supported by columns, erected over the altar of a church, as a dignifying architectural ornament. The law and history of this ornament was exhaustively discussed in *White v. Bowron*, 1873, L. R. 4 Ad. & Ec. 207, in which case a faculty for its erection in the Church of St. Barnabas, Pimlico, was refused by the Consistory Court of London, on the ground of its absolute illegality. In the course of the evidence, however, it was established that baldachinos existed in many ancient and modern churches in England, and it is believed that, despite the decision, several churches with baldachinos have since been consecrated, e.g. Holy Redeemer, Clerkenwell, dio. London, 1888.

Bale.—A term in commerce usually employed to denote a compressed package of goods; but "it is an ambiguous word, which may mean many things, and therefore it is for a jury to say what it means in a mercantile contract" (*per* Cresswell, J., *Gorrisen v. Perrin*, 1857, 27 L. J. C. P. 32). So in *Taylor v. Briggs*, 1827, 2 Car. & P. 525, where one party contended that bale meant a compressed bale, the other that it meant a bag, Abbott, C. J., left the meaning of the term to the jury, who found that a bale meant a compressed bale; and see *Benson v. Schneider*, 1817, 7 Taun. 272.

Balk.—An unploughed strip of land lying between lands which are private property, bounding the tilled portions of the fields. The arable lands of a township were generally divided into large parcels, called furlongs or shots, separated from each other by broad strips left untilled, generally covered with bushes, called balks. These parcels were subdivided into a number of parallel strips, each of which was called a stiche or ridge (Latin, *selio*). The stiches were likewise separated by balks of untilled earth. In some places the stiches were themselves called balks (Seeböhm, *English Village Commun*; Elton, *Law of Commons and Waste Land*, 23, 153; Elphinstone, *Interpretation of Deeds*, 562).

It is doubtful whether there is a presumption of law that the balks are the property of the owners of the adjacent soil (*Godmanchester v. Phillips*, 1836, 4 Ad. & E. 560-561).

Ballast.—See HARBOURS.

Ballot.—The primary meaning of the word "ballot," as its etymology denotes, is to record a vote by means of small balls. For the purposes of election law, however, the ballot signifies the system of secret voting which, for the protection of voters against intimidation and other external influence, was introduced into Parliamentary and Municipal elections by the Ballot Act, 1872, 35 & 36 Vict. c. 33, in substitution for the previous system of open voting.

That Act provides (s. 2) that in the case of a poll at an election, the votes are to be given by ballot. The ballot of each voter is to consist of a paper, termed a ballot paper, showing the names and description of the candidates. Each ballot paper is to have a number printed on the back, and, attached to it, a counterfoil with the same number printed on the face. At the time of voting the ballot paper is to be marked on both sides with an official mark, and delivered to the voter within the polling station. The number of the voter on the register of voters is to be marked on the counter-

foil. The voter, having secretly marked his vote on the paper, and folded it up so as to conceal his vote, is to place it in a box, called a ballot-box, in the presence of the presiding officer, after having shown him the official mark at the back of the paper. After the close of the poll the ballot-boxes are to be sealed up, so as to prevent the introduction of additional ballot papers, and taken charge of by the returning officer, who, in the presence of such agents of the candidate as may be in attendance, is to open the ballot-boxes, count the total number of ballot papers, and ascertain the result of the poll, by counting the votes given to each candidate, and forthwith declare the candidate or candidates having the majority of votes to be elected, and return their names to the Clerk of the Crown in Chancery.

Certain directions for the guidance of the voter in voting are required by the Act (see sched. 2), to be printed in conspicuous characters and placarded outside every polling station. These show for how many candidates the voter may vote, and direct that on receiving the ballot paper the voter is to go into one of the compartments at the polling station and, with the pencil provided, place a cross on the right-hand side opposite the name of each candidate for whom he votes; there is, however, no objection to the use of any other pencil or ink, or other means of marking the paper, provided that no indication is thereby afforded as to the identity of the voter (see *Wigtown*, 1874, 2 O'M. & H. 223; *Berwick*, 1880, 3 O'M. & H. 180). If the voter inadvertently spoils a ballot paper, he should return it to the officer, who will give him another paper (sched. 1, r. 28).

In the case of a voter, incapacitated, from blindness or other physical cause, from voting, as prescribed by the Act, or where the voter is a Jew, and the poll is on a Saturday, and he objects on religious grounds to vote as prescribed by the Act, or if the voter makes a declaration that he is unable to read, the presiding officer must, in the presence of the agents of the candidates, cause the vote of such voter to be marked on a ballot paper in manner directed by such voter, and the paper to be placed in the ballot-box. The name and number on the register of every voter whose vote is so marked, and the reason why it is so marked, must be entered on a list called the "List of votes marked by the presiding officer" (sched. 1, r. 26).

It is the duty of the returning officer to provide a sufficient number of polling stations at each polling place, to distribute them amongst the voters in such manner as he thinks most convenient, and to give public notice of the situation of the polling stations, and a description of the voters entitled to vote at each station. Each polling station must be furnished with such number of compartments in which voters can mark their votes, screened from observation, as the returning officer thinks necessary; and there must be at least one compartment for every hundred and fifty electors. No person is to be admitted to vote at any polling station except the one allotted to him. But as to the voting of police at parliamentary elections, see the Police Disabilities Removal Act, 1887 (50 & 51 Vict. c. 9), which was extended to other elections by the Police Disabilities Removal Act, 1893 (56 Vict. c. 6). The returning officer must also provide such ballot-boxes, stamping instruments, copies of register of voters, and other things, appoint and pay such officers, and do such other acts and things as may be necessary for effectually conducting an election in the manner provided by the Act (see s. 8, and sched. 1, rr. 15-21). In one case an election was held to be void where the returning officer omitted to provide sufficient ballot-boxes, papers, stamps, and other materials, there being consequently no poll at two of the polling stations (*Hackney*, 1874, 2 O'M. & H. 77).

Every ballot-box must be so constructed that the ballot papers can be

introduced therein, but cannot be withdrawn therefrom without the box being unlocked. Just before the commencement of the poll the presiding officer at each polling station is to show the ballot-box empty to such persons as may be present, so that they may see that it is empty, and he is then to lock it and place his seal upon it so as to prevent its being opened without breaking such seal, and to place it in his view for the reception of the ballot papers (sched. 1, r. 23).

The ballot papers must as nearly as possible be in the form given by the Act, and must contain the surname of each candidate, and if there are two or more candidates of the same surname, also their other names, printed in large characters, and their names, addresses, and descriptions printed underneath in small characters, and must be capable of being folded up (sched. 1, r. 22; for form of ballot paper and directions as to printing see sched. 2).

There are two sorts of ballot papers, the ordinary papers, and others, which must be of a different colour, for the tendered votes (sched. 1, r. 27). If a person representing himself to be a particular elector named on the register applies for a ballot paper, after some one else has already voted in his name, the presiding officer must ask him the two questions allowed by law to be put when a voter comes to the poll, viz.—(1) whether he is the same person whose name appears as A. B. on the register of voters, and (2) whether he has already voted at the election, and require him to take the oath or affirm that he is the same person whose name appears as A. B. on the register of voters (for forms of the questions and oath see 6 & 7 Vict. c. 18, s. 81; as to who may administer the oath, see Ballot Act, 1872, s. 10). After duly answering the questions and taking the oath, the applicant is entitled to mark one of the tendered ballot papers in the same manner as any other voter may mark one of the ordinary ballot papers (sched. 1, r. 27). Such tendered ballot paper is, however, instead of being put into the ballot-box, to be given to the presiding officer, and indorsed by him with the name of the voter and his number on the register of voters, and set aside in a separate packet, and is not to be counted by the returning officer. Where the applicant himself put the tendered vote into the ballot-box, instead of returning it to the presiding officer, in accordance with this rule, the vote was held bad (*Buckrose*, 1886, 4 O'M. & H. 115). The name of the voter and his number on the register are to be entered on a list, called the "Tendered Votes List" (sched. 1, r. 27). Though the tendered vote is not to be counted by the returning officer, on a scrutiny it may be added, and, in the case of personation, the vote of the person guilty would be struck off (*Oldham*, 1869, 1 O'M. & H. 152; *St. Andrews*, 1886, 4 O'M. & H. 32; see also SCRUTINY); and it may be mentioned that the omission of the indorsement by the presiding officer will not prevent the vote from being counted on a scrutiny (*Stepney*, 1886, 4 O'M. & H. 43).

Any person applying for a ballot paper, under the Act, is deemed "to tender his vote" (see s. 15).

A returning officer is not entitled to reject any vote tendered by any person whose name is on the register of voters, except by reason of its appearing to the returning officer or his deputy, upon putting the above-mentioned questions, or either of them, that the person so claiming to vote is not the same person whose name appears on the register, or that he had previously voted at the same election, or where such person refuses to take the oath or make the affirmation (6 & 7 Vict. c. 18, s. 82).

As to actions against a returning officer for improperly rejecting a vote, see RETURNING OFFICER.

Under sec. 2 of the Ballot Act, a ballot paper is void and is not to be counted—(1) If it has not on its back the official mark (see *Wigtown*, 1874, 2 O'M. & H. 216; *Ackers v. Howard*, 1886, 16 Q. B. D. 753; *Cirencester*, 1893, Day's *El. Cas.* 155). Though the Act (s. 2) requires a ballot paper to be marked on both sides with the official mark, yet a ballot-paper has been held not to be void because the mark does not appear on its face (*Ackers v. Howard*, 1886, 16 Q. B. D. 739; see also *Thornbury*, 1886, 4 O'M. & H. 65; and *Cirencester*, 1893, *supra*). The official mark, a stamping instrument for which is to be provided by the returning officer, must be kept secret, and the same mark cannot be used again for the same county or borough for seven years (s. 4; sched. 1, r. 20). The modern practice is to use a stamping instrument which perforates the ballot paper. (2) If votes are given on it to more candidates than the voter is entitled to vote for (see *Woodward v. Sarsons*, 1875, L. R. 10 C. P. 748; *Philipps v. Goff*, 1886, 17 Q. B. D. 814). (3) If anything, except the number on the back, is written or marked on it, by which the voter can be identified (see *Woodward v. Sarsons*, 1875, L. R. 10 C. P. 733; *Stepney*, 1886, 4 O'M. & H. 37 and 38; *Buckrose*, *ibid.* 111; *Cirencester*, 1893, Day's *El. Cas.* 158). And under sched. 1, r. 36, of the Act a ballot paper which is unmarked or void for uncertainty is not to be counted (see *Berwick*, 1880, 3 O'M. & H. 182; *Stepney*, 1886, 4 O'M. & H. 37; *Buckrose*, 1886, *ibid.* 110–112; *Cirencester*, 1893, Day's *El. Cas.* 159); but the cases show that any mark, indicating with reasonable certainty an intention to vote for a particular candidate, is sufficient (see *Woodward v. Sarsons*, 1875, L. R. 10 C. P. 733; *Philipps v. Goff*, 1886, 17 Q. B. D. 805; *Wigtown*, 1874, 2 O'M. & H. 229; *Berwick*, 1880, 3 O'M. & H. 180; *Buckrose*, 1886, 4 O'M. & H. 112; *Cirencester*, 1893, Day's *El. Cas.* 157).

After the completion of the counting, in the case of parliamentary elections, the returning officer has to seal up the ballot papers and other documents and transmit them to the Clerk of the Crown in Chancery (see sched. 1, rr. 36–38; as to the mode of transmission, see 6 & 7 Vict. c. 18, s. 93), in whose custody they remain for a year, after which they are destroyed, unless otherwise directed by order of the House of Commons or of the High Court (see sched. 1, r. 39). After they have been forwarded to the Clerk of the Crown, no one can inspect any rejected ballot papers, counterfoils, or counted ballot papers, except under the order of the House of Commons, or the High Court, or a judge at chambers, subject to such conditions as may be imposed in order to preserve the secrecy of the ballot (sched. 1, rr. 40 & 41; see also *Tyrone*, 1873, Ir. R. 7 C. L. 190; *Stowe v. Jolliffe*, 1874, L. R. 9 C. P. 446).

As to recounting the ballot papers in cases of alleged mistake in the counting, see RECOUNT.

As to the production and inspection of ballot papers at a criminal trial, see *R. v. Bearsdall*, 1876, 1 Q. B. D. 452.

The whole system of election by ballot is in every detail regulated by the Act, and the rules and forms contained in the schedules to the Act. The cases show that the enactments of the Act must be absolutely obeyed, but the rules and forms contained in the schedules are merely directory, and it is not essential to follow them in every detail, provided they be substantially obeyed (see *Thornbury*, 1886, 16 Q. B. D. 739; *Woodward v. Sarsons*, 1875, L. R. 10 C. P. 746; *Philipps v. Goff*, 1886, 17 Q. B. D. 812). Moreover, the Act itself provides (s. 13) that no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule, or any mistake in the use of the forms in the second schedule, if it appears to the tribunal having cognisance of the question

that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election.

Stringent provisions are contained in the Act for the maintenance of the secrecy of the ballot by every officer, clerk, and agent in attendance at a polling station, or at the counting of the votes, and against the interference by any such person with the voter, or any attempt to procure information from him as to the candidate for whom he is about to vote or has voted (see s. 4).

Certain specific offences in respect of ballot papers and ballot-boxes are set forth in sec. 3 of the Act, which makes every person guilty of a misdemeanour and liable, if he is a returning officer or an officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years, with or without hard labour; and if he is any other person, to imprisonment for any term not exceeding six months, with or without hard labour, who:—

- (1) Forges or counterfeits or fraudulently defaces or fraudulently destroys any ballot paper or the official mark on any ballot paper; or
- (2) Without due authority supplies any ballot paper to any person; or
- (3) Fraudulently puts into any ballot-box any paper other than the ballot paper which he is authorised by law to put in; or
- (4) Fraudulently takes out of the polling station any ballot paper; or
- (5) Without due authority destroys, takes, opens, or otherwise interferes with any ballot-box or packet of ballot papers then in use for the purposes of the election.

Any attempt to commit any of the above offences is punishable in the manner in which the offence itself is punishable.

The provisions of the Ballot Act, with the exception of the provisions of Part III. relating to personation, do not apply to university elections (ss. 27 and 31).

The Act was to have expired in 1880 (s. 33); it has, however, been annually re-enacted by the Expiring Laws Continuance Act.

As to the application of the Ballot Act to municipal elections, see sched. 1, pt. 2, r. 64, of the Act, and the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 58.

As to municipal elections in the City of London, see the City of London Ballot Act, 1887, 50 Vict. c. xiii.

With regard to County Council elections, the Local Government Act, 1888, 51 & 52 Vict. c. 41. ss. 2 and 75, incorporates the provisions of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, under which the provisions of the Ballot Act are applicable, so far as circumstances admit.

The provisions of the Ballot Act are applied by the Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 48 (3), to Parish Council elections, and the other elections under that Act, subject, however, to the adaptations, alterations, and exceptions made by the rules framed under that Act by the Local Government Board. For these rules see the Election Orders issued from time to time by the Local Government Board.

As to School Board elections, the Elementary Education Act, 1873, 36 & 37 Vict. c. 86, ss. 6 and 26, and sched. 2, applies the provisions of the Ballot Act so far as circumstances admit, and subject to the alterations and regulations prescribed by the Education Department. (See the Election Orders issued from time to time.)

It should be noted that, under these Orders, there is an important distinction with regard to the ballot at School Board elections and the ballot at other

elections. At School Board elections the voting is cumulative, *i.e.* every voter is entitled to a number of votes equal to the number of the members of the School Board to be elected, and may give all or some of such votes to one candidate, or may distribute them among the candidates as he thinks fit, and the voter may place against the name of any candidate for whom he votes the number of votes he gives to such candidate, in lieu of a cross.

For the provisions of the Ballot Act, with reference to the nomination of candidates, see NOMINATION. •

Ballot-Box.—See BALLOT.

Ballot Papers.—See BALLOT.

Banc.—This term, which is derived from the Latin word *bancus*, means a bench or seat of justice, such as the Queen's Bench, or *Bancus Regineæ*, and it was extended to certain sittings of the judges in the Court, in which such bench or seat was placed. Sittings *in banc* were, before the coming into operation of the Judicature Acts, held at Westminster by the judges of the King or Queen's Bench, the Common Pleas, and the Exchequer. See SUPREME COURT. These judges constituted the Court, and exercised, not only a formal jurisdiction in regulating the proceedings in suits, but also a summary jurisdiction in dealing with matters brought before them by way of motion (Broom's *Commentaries*, 4th ed., p. 51). Such matters involved for the most part the decision of questions of law and applications for new trials, and included in the Court of Queen's Bench the direction and regulation of various criminal proceedings. The Court sitting *in banc* likewise decided special cases and demurrers (*q.v.*), and regulated the practice of the Courts. Formerly sittings *in banc* were confined to term time, and the *puisne* judges of each of the above-mentioned Courts sat by rotation in each term, or otherwise, as they agreed amongst themselves, so that no greater number than three of them sat at the same time *in banc* for the transaction of business in term, unless in the absence of the Lord Chief-Justice or Lord Chief-Baron (11 Geo. iv. and 1 Will. iv. c. 70, s. 1). By 1 & 2 Vict. c. 32, s. 1, power was, however, conferred on the judges of holding sittings *in banc* at the times appointed for holding sittings at Nisi Prius in London and Middlesex, and this power was further extended by sec. 95 of the Common Law Procedure Act, 1854, which provided that such sittings might be held at any time, or times, whether in term or vacation, not being between the 10th of August and the 24th of October. Sometimes, also, when occasion required, one of the judges of the above-mentioned Courts, while the other judges of the same Court were sitting *in banc*, sat apart from them for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the Court to which he belonged, in the same manner and with the same force and validity as might be done by the Court sitting *in banc* (11 Geo. iv. & 1 Will. iv. c. 70, s. 1). These last-mentioned sittings usually took place in what was called the Bail Court (*q.v.*). The business of the Court *in banc* was transferred by sec. 41 of the Judicature Act, 1873, to the Divisional Courts of the High Court of Justice, established under that

Act, and these Courts are now constituted of two judges, or of such additional number as the President of the Division may think expedient (Appellate Jurisdiction Act, 1876, s. 17).

See APPEALS; DIVISIONAL COURTS.

Band of Music.—See ILLEGAL PRACTICES.

Bangor, University College of.—See WALES (UNIVERSITY OF).

Banishment.—Transportation, or banishment, was first inflicted as a punishment by Statute 39 Eliz. c. 4.

But the first Act of Parliament is 18 Car. II. c. 3, s. 2, by which certain offenders were to be sent to America; and, in subsequent Acts of the same reign, return before the expiration of the sentence was treated as felony. 4 Geo. I. c. 11, provides that, for criminals without benefit of clergy, the Crown in its mercy might prescribe transportation. 5 Geo. IV. c. 84, as amended by 11 Geo. IV. and 1 Will. IV. c. 39, empowered the Crown to appoint places of confinement beyond seas. New South Wales, Van Diemen's Land, and Norfolk Island were the penal settlements; but the colonists objecting, 10 & 11 Vict. c. 67 appointed certain prisons in Great Britain in their place; and by 16 & 17 Vict. c. 99, penal servitude might be imposed if the sentence was under fourteen years. 20 & 21 Vict. c. 3, abolished transportation as a punishment, though the Secretary of State may still direct penal servitude beyond the seas (see Kerr, Blackstone, *Com.* iv. 409 *n.*). See PENAL SERVITUDE; TRANSPORTATION.

Bank Books.—*Evidence*—

1. Entries in the books of the Bank of England may be proved by examined copies (*Mortimer v. McCallam*, 1840, 6 Mee. & W. 58).

2. Proof of the books of other banks is facilitated by the Bankers' Books Evidence Act, 1879. "Bank" means in the Act a bank which has duly made returns to the Commissioners of Inland Revenue (this fact is provable by affidavit or evidence of an officer of the bank, or a copy of the newspaper in which the returns are published); any certified or post-office savings-bank; and (45 & 46 Vict. c. 72, s. 11) any banking company making returns to the registrar of joint-stock companies (this fact is provable by the certificate of the registrar or assistant-registrar). The Act makes copies of entries in the ordinary books of the bank *prima facie* evidence both of the entries and of the matters thereby recorded, provided that the entries were made in the ordinary course, and the copies have been examined with the entries and are correct, and the books are in the custody of the bank. On the application of any party to legal proceedings, it may be ordered that the party shall have liberty to inspect and take copies of entries in a bank's books for the purposes of the litigation (s. 7). Such an order will be made wherever the applicant could before the Act have compelled the banker to attend at the hearing and produce his books (*Arnott v. Hayes*, 1887, 36 Ch. D. 731), and notwithstanding that the account to which the entries relate is kept in the name of a stranger, if the entries would be evidence against a party to the proceedings (*South Stafford Tramway Co. v.*

Ebbsmith [1895], 2 Q. B. 669). It may be made *ex parte* (*Arnott v. Hayes, supra*). But no order will be made for the purpose of giving a party inspection before the trial which he would not have been entitled to upon discovery in the action (*s. c.*; *Parnell v. Wood* [1892], Prob. 137; see also *Perry v. Phosphor Bronze Co.*, 1894, 71 L. T. 854). See, further the notes in the Annual Practice to Order 37, r. 7.

No banker or bank officer can be compelled to produce books, or to give evidence of the contents of books which may be proved by copies under the Act, in any proceedings to which the bank is not a party, unless by the order of a judge for special cause (*s. 6*).

Bank Holidays.—Easter Monday, the Monday in Whitsun week, the first Monday in August, and the 26th of December if a week-day, or if it is a Sunday the 27th (Holidays Extension Act, 1871), or any day appointed by Order in Council in place of one of these, and any day appointed by royal proclamation in addition to these, is a statutory bank holiday in England. All such days are to be kept as close holidays in all banks, and bills and notes payable on any such holiday are to be payable, or to be noted and protested, on the next following day. Notice of dishonour, presentation, and forwarding of bills and notes is in like manner to be given or made on the next following day. No person is compellable to make any payment or do any act on a statutory bank holiday which he would not be compellable to make or do on Christmas day or Good Friday (Bank Holidays Act, 1871). The four first-mentioned days are to be kept as public holidays in the Customs, Inland Revenue offices and bonded warehouses, and may, upon notice being given, be so kept in any docks (Holidays Extension Act, 1871). See BUSINESS DAY; CHRISTMAS DAY; SUNDAY; DAYS OF GRACE.

Bank-Note.—1. *Definition.*—A bank-note is the promissory note of a banker payable to bearer on demand. For the purposes of the Stamp Acts the name includes other instruments (see Stamp Act, 1854, s. 11; Stamp Act, 1891, s. 29).

2. *Issue.*—The privilege of issuing bank-notes in England belongs exclusively to the Bank of England, and such banks as were lawfully issuing their own notes in 1844 (see BANK OF ENGLAND). It is forbidden to issue Bank of England notes (7 Geo. IV. c. 6, s. 3), or to circulate in England, Scotch or Irish (9 Geo. IV. c. 56) notes of less value than £5.

3. *Legal Tender and Currency.*—Bank of England notes are legal tender in England for all sums above £5, except by the bank itself and its branches (Bank of England Act, 1833, s. 6). The notes are treated as cash, not as securities for money, and they pass by mere delivery (*Miller v. Race*, 1758, 1 Burr. 452); they form a contract between the holder and the bank which is ambulatory, by mere passing from hand to hand (*Suffell v. Bank of England*, 1882, 9 Q. B. D. 555). The notes of a county bank are a good tender if not objected to at the time of tender (*Polglass v. Oliver*, 1831, 2 Cromp. & J. 15).

4. *Alteration.*—The alteration of a bank-note in a material particular, as its amount, date, or number, avoids the note (*Suffell v. Bank of England, supra*; see the notes to *Master v. Miller*, in 1 Smi. L. C., 2 R. R. 399). But in the case of notes, other than those of the Bank of England (*Leeds and County Bank, v. Walker*, 1883, 11 Q. B. D. 84), the alteration, if it is not apparent, does

not prejudice the title to payment of a holder in due course (S. C., and Bills of Exchange Act, 1882, s. 64).

5. *Forged and Stolen Notes*.—A forged note confers, of course, no title to payment against the bank. The payee of a forged note, or a note avoided by alteration, can recover the consideration he gave for it from the payer, as money paid in mistake of fact (*Jones v. Ryde*, 1814, 5 Taun. 488, 15 R. R. 561; Bills of Exchange Act, ss. 58 (3)). A stolen note, or a note obtained by fraud, being like cash (see above, 3), must be paid on presentation by the bank to any holder who is not shown to have come by it dishonestly (*Miller v. Race*, 1758, 1 Burr. 452), but the bank is entitled to delay payment of a stopped note for a reasonable time, in order to make inquiries (*Solomons v. Bank of England*, 1791, 13 East, 135; 12 R. R. 341). Negligence in taking a stolen note is not sufficient to disentitle the holder to payment (*Uther v. Rich*, 1839, 10 Ad. & E. 784), nor is forgetfulness of information regarding the note (*Raphael v. Bank of England*, 1855, 17 C. B. 161; Bills of Exchange Act, s. 90), but deliberate refusal to make inquiries, when the circumstances excite suspicion, may be sufficient evidence of bad faith (*Solomons v. Bank of England*, *supra*; *Jones v. Gordon*, 1877, 2 App. Cas. 616).

6. *Payment—Duty to Present*.—If notes (other than those of the Bank of England) are paid without indorsement, and are dishonoured, the payee cannot recover the consideration from the payer (Bills of Exchange Act, s. 58), unless there was an agreement or circumstances to show that the payment was to be conditional upon the notes being met, as if the notes were cashed to oblige the payer (*Turner v. Stones*, 1843, 1 Dow. & L. 122; and see *Timmins v. Gibbins*, 1852, 18 Q. B. 722), or were given for an antecedent debt (*q.v.*) (see *Guardians of Litchfield v. Greene*, 1857, 26 L. J. Ex. 140). And if the holder of the notes does not promptly present or circulate the notes, he cannot recover in any event (*s. c.*; *Camidge v. Allenby*, 1827, 6 Barn. & Cress. 373).

7. *Lost Notes*.—In any action upon a lost note the Court may order that the loss of the note shall not be set up, provided that an indemnity be given (Common Law Procedure Act, 1854, s. 87; Bills of Exchange Act, s. 70).

8. *Half Notes*.—If half a note be sent on first, for safety, the property in the whole remains in the sender, and he may demand the half back (*Smith v. Mundy*, 1860, 3 El. & El. 22). It is said the holder of one half, the other being lost, can recover from the bank without giving an indemnity (*Redmayne v. Burton*, 1860, 2 L. T. N. S. 324, *per* Willes).

Bank of England.—The “Governor and Company of the Bank of England” are a corporation instituted by letters-patent under a special Statute of 1694 (5 & 6 Will. & Mary, c. 20). For the early history of the Bank, see *Bank of England v. Anderson*, 1837, 3 Bing. N. C. 589. It is now chiefly regulated by the Bank of England Act, 1833 (B. A. 1833), and the Bank Charter Act, 1844 (B. C. A. 1844). The Bank Act, 1892, provides for the grant of a supplementary charter to regulate the internal affairs of the Bank. Until redemption by the repayment of its loans to the Government (B. A. 1833, s. 14), the Bank enjoys a monopoly in regard to the issue of bank-notes, and dealing as bankers in bills of exchange payable to bearer on demand. The monopoly was formerly very extensive (see the case cited *supra* and 39 & 40 Geo. III. c. 28), but it has been much curtailed by modern statutes. Its present extent is shown by the following restrictions. No

other bank or banker, except a bank or banker who on the 6th of May 1844 was lawfully issuing its or his own notes, and who has done so continuously since that date (B. C. A. 1844, s. 12), may make or issue bank-notes in any part of the United Kingdom (B. C. A. 1844, ss. 10, 12, and 28), or take up money upon its, or his, bills, payable to bearer on demand (s. 11). And the excepted banks and bankers are limited to the average amounts of these issues in October 1844 (s. 19). Before May 1844, banking firms of not more than six members might, upon obtaining licences under the Bank Note Act, 1828, s. 1, issue notes at places not in the City of London, or within three miles of it; and banking firms of more than six members, having no branch in London, might issue notes at places not within sixty-five miles of London (39 & 40 Geo. III. c. 28, s. 15; B. A. 1833, ss. 2 and 3; B. C. A. 1844, s. 26). The rights of establishing banking firms secured by the Bank Charter Act, 1844, are not affected by subsequent changes of membership, provided that where their privileges depended upon their having not more than six members, that number is not exceeded (B. A. 1844, s. 11). But an old bank of issue may, under the Act 20 & 21 Vict. c. 49, s. 12 (probably) now increase its membership to ten, without losing the right to issue notes at places more than three miles from the City of London. If an old bank of issue assigns to a limited company the profits and management of its note issue, its privilege is lost (*A.-G. v. Birkbeck*, 1884, 12 Q. B. D. 605; see also *Prescott & Co. v. Bank of England* [1894], 1 Q. B. 351). The Bank of England is forbidden to trade in goods (5 & 6 Will. & Mary, c. 20, ss. 27 and 28), and it is required to buy all gold bullion offered in exchange for its notes, at the price of £3, 17s. 9d. per ounce of standard gold. As to judgments against the Bank, see 5 & 6 Will. & Mary, c. 20, s. 31; and 8 & 9 Will. III. c. 20, s. 45.

The issue department was separated from the general banking department in 1844, and the value of the notes of the Bank in circulation is restricted to the amount of the securities then deposited with the issue department, namely, £14,000,000 (B. C. A. 1844, s. 1), subject to increase upon the withdrawal of the notes of other banks of issue (s. 5). One quarter of the cash and bullion held against notes may be silver (s. 3). The issue department is required to publish weekly accounts (s. 6). The Bank was empowered by the Country Bankers Act, 1826, s. 15, to open and carry on branch banks, all notes issued at such branches being payable in coin at the branches as well as in London.

The Bank manages the banking business connected with the national debt and the transfer of government securities (National Debt Act, 1870); and see NATIONAL DEBT; Anson on *The Constitution*, part ii. pp. 307-332; and as to payment of dividends by warrants, the National Debt Act, 1889, s. 4; Exchequer Bonds and Bills, 29 & 30 Vict. c. 22, s. 30, and Treasury Bills, 40 & 41 Vict. c. 2, s. 13). It holds the funds in Court (see FUNDS IN COURT, and 35 & 36 Vict. c. 44).

As to the duty of the Bank in relation to transfers of stock, see *Humberstone v. Chase*, 1836, 2 Y. & C. Ex. 209 (the Bank is only liable as a bailee); *Prosser v. Bank of England*, 1872, L. R. 13 Eq. 611 (evidence of title must satisfy the Bank); as to the transfer of companies transferable in the books of the bank, see 33 & 34 Vict. c. 71, s. 73; and see DISTINGUISH. The Bank must, upon notice, obey orders of Court made under the Trustee Act, 1893, s. 35 (4), or under the Lunacy Acts (see *In re Broune* [1894], 3 Ch. 412, and *In re Shortridge* [1895], 1 Ch. 278). It is not bound to show its register of stock-holders to anyone who cannot show that he has a *bona fide* interest in some unclaimed stock (*R. v. Bank of England* [1891], 1 Q. B. 785).

See **BANKS**; **BANK BOOKS**; **BANK-NOTE**; **BANK SHARES**; and **BANKER AND CUSTOMER**.

Bank Shares.—All contracts for the sale and purchase or transfer of any shares or stock or other interests in a joint-stock banking company, are void, unless they set forth in writing the distinctive numbers of the shares, stock, or interests, or, if there are no such numbers, the names of the registered holders. It is a misdemeanour to insert false numbers or names in such contracts (Leeman's Act, 30 Vict. c. 29, s. 1). The lists of bank shareholders must be shown to registered shareholders (*ibid.* s. 2). The provisions of this Act as to inserting numbers, etc., are regularly disregarded on the Stock Exchange, but the custom to do so is illegal and unreasonable (*Neilson v. James*, 1882, 9 Q. B. D. 546); possibly it may be binding upon principals of a stockbroker who know of it when they employ him (*Perry v. Barnett*, 1885, 15 Q. B. D. 388). See further *Loring v. Davis*, 1886, 32 Ch. D. 625, and *Mitchell v. Glasgow Bank*, 1877, 4 App. Cas. 624.

Bank Stock.—See **STOCK**.

Banker and Customer.—1. *Relationship.*—The bank is a debtor to the customer (*Robarts v. Tucker*, 1851, 16 Q. B. 560), not a bailee or a trustee (*Ex parte Waring*, 1866, 36 L. J. Ch. 151), in respect of money deposited with it, and not actually appropriated to a particular purpose (*Farley v. Turner*, 1857, 26 L. J. Ch. 710) (as to property deposited for safe keeping, see below, 6). And the relationship is still that of debtor and creditor if the customer has overdrawn (*Cunliffe Brooks v. Blackburn Benefit Society*, 1884, 9 App. Cas. 857). It follows that upon bankruptcy the customer has merely a right of proof in respect of his current or deposit accounts (*re Barnard's Bank*, 1870, 39 L. J. Ch. 635).

2. *Forged Bills and Cheques.*—It follows that the bank can only be discharged by payments made to the customer, his agent, or principal (*Sims v. Bond*, 1833, 5 Barn. & Adol. 389), or to someone who by mercantile law can give a good discharge (*Robarts v. Tucker*, *supra*). So, if the bank pays the holder of a forged acceptance, or of a real acceptance of the customer to which the holder makes title through a forged indorsement, it cannot charge the customer's account (*s. c.*). The customer may be estopped from denying that the indorsement is good (*s. c.*), *e.g.* if his negligence was the direct and proximate cause of the payment being made. Negligence in the custody of its seal by a corporation is not such cause (*Staple of England v. Bank of England*, 1887, 21 Q. B. D. 160). See *Bank of England v. Vagliano* [1891], App. Cas. 107, where the customer sent letters of advice to the bank to meet the forged bills, and several of the Law Lords (but not a majority) regarded this as sufficient to entitle the bank to judgment. The customer's acceptance is a warranty of the genuineness of the drawee's signature only (*S. C.*; Bill of Exchange Act, 1882, s. 54 (2)). But the mere fact that the forged indorsement is on the bill before acceptance by the customer, at any rate unless the fact is known to the bank, does not enable the bank to charge the customer (*Robarts v. Tucker*, *supra*), nor does acceptance of a bill so drawn as to be easily altered (*Scholfield v. Londesborough* [1895], 1 Q. B. 536; [1896], App. Cas. 514). A bill to the order of a non-existent person, or one who is not intended by the drawer to have anything to do with it (*Bank of England v.*

Vagliano, supra), is, in effect, a bill to bearer (Bills of Exchange Act, s. 7 (3)), and may be paid by the bank from its customer's money (s. c.); and so may an altered bill, if the alteration is not apparent (Bills of Exchange Act, s. 64 (1)). The bank can recover from the holder of a forged bill the money paid to him, if either he did not demand payment in good faith (*Martin v. Morgan*, 1819, 1 Brod. & B. 289; 21 R. R. 603), or the bank paid without negligence and claimed repayment before the payee had altered his position (*London and River Plate Bank v. Bank of Liverpool* [1896], 1 Q. B. 7; see Chalmers on *Bills of Exchange*, 5th ed., p. 207). If the customer, being in exclusive knowledge of a forgery affecting a bill which the bank has paid on his account, withholds the knowledge from the bank until its chance of recovering the money is materially prejudiced, he will be estopped from objecting to be charged with the money (see *Ogilvie v. West Australian Corporation* [1896], App. Cas. 257). Crossed cheques constitute an exception to the bank's liability (see CHEQUE). If a bill is drawn upon a bank payable to order on demand, and the bank upon which it is drawn pays it in good faith, and in the ordinary course, the bank can charge its customer, although the indorsement was a forgery (Bills of Exchange Act, s. 60).

3. *Accounts, Pass-Book, Appropriation.*—The customer's pass-book is evidence against him of the matters entered in it, if it has been sent to him in the ordinary course (see *Clayton's case*, 1816, 1 Mer. 530; 5 R. R. 161; *Commercial Bank v. Rhind*, 1860, 3 Macq. H. L. 643). The bank may show entries in the pass-book to have been made by mistake (L. C.), subject to any estoppel arising from the fact that the customer has altered his position upon the faith of the entries (see *Skyring v. Greenwood*, 1825, 4 Barn. & Cress. 281; but *quære*; see also ESTOPPEL). Payments to and drawings upon current account are taken to be set off against each other automatically, the earliest drawing against the earliest payment, and so on (the "rule in *Clayton's case*"). This rule does not apply as between *cestui-que trust* and creditors of the customer so as to give the creditors the benefit of payments of the trust moneys (*In re Hallett's Estate*, 1880, 13 Ch. D. 696), but does apply in cases of conflict between claimants to moneys paid out of different trust funds (*Wood v. Stenning* [1895], 2 Ch. 433). The bank may treat all a customer's personal accounts as one (*In re European Bank*, 1872, L. R. 8 Ch. 41), but may not use the balance of an account, as to which it has notice that it is not a personal account, to meet a deficiency on a personal account (*Ex parte Kingston*, 1871, L. R. 6 Ch. 632). On the death of a surety for a current account, it is common practice for the bank to close the account and open a fresh one with the customer. This prevents the surety's estate getting the benefit of subsequent payments to current account by the customer (*In re Sherry*, 1884, 25 Ch. D. 692). As to what dealings with a firm's account discharge a retired partner from liability for an old overdraft, see *Rouse v. Bradford Bank* [1894], App. Cas. 586.

4. *Duty of Banker.*—The bank must pay its customer's cheque, if it has funds sufficient to meet the cheque, on presentation, within an interval reasonably sufficient for satisfying itself of the genuineness of the signature (*Marzetti v. Williams*, 1830, 1 Barn. & Adol. 415), in the order of presentation of the cheque (*Kilsby v. Williams*, 1822, 1 Barn. & Ald. 815; 24 R. R. 564), unless the bank has notice of the death of the customer or of a countermand of payment by him (Bills of Exchange Act, s. 75). Cheques drawn on a branch bank are payable there only (*Prince v. Oriental Bank*, 1878, 3 App. Cas. 325). The bank is not bound to pay bills accepted by the customer and made payable at the bank (*Robarts v. Tucker, supra*), but may do so (*Kymer v. Laurie*, 1849, L. J. Q. B. 218); or to accept bills

drawn upon it, in the absence of special agreement to do so, but such agreement may be inferred from the bank having accepted previous bills and having funds to meet the bill in question (see *Cumming v. Shand*, 1860, 29 L. J. Ex. 129). If money is paid the bank, with its assent, to meet a bill, it may be sued by the holder (see *De Bernales v. Fuller*, as stated in 3 App. Cas. at p. 334).

The bank must keep the customer's affairs secret, unless it has a reasonable cause for disclosing them (*Hardy v. Veasey*, 1868, L. R. 3 Ex. 107), as, if the banker be examined in a winding-up (*In re Smith*, 1869, L. R. 4 Ch. 421), or called as a witness (*Lloyd v. Freshfield*, 1826, 2 Car. & P. 325).

5. *Lien and Pledge*.—The bank has, in the absence of any inconsistent special agreement (*In re Boves*, 1886, 33 Ch. D. 586), a general lien for all that is due to it from the customer. The lien extends to all the securities and moneys of the customer in its hands which have not been deposited for a particular purpose (*Davis v. Bowsher*, 1794, 5 T. R. 488, 2 R. R. 650; *Brandao v. Barnett*, 1846, 12 Cl. & Fin. 787), but not to property merely deposited for safe keeping (*Brandao v. Barnett*; *Leese v. Martin*, 1873, L. R. 17 Eq. 224). Neither the general lien (*Jeffreys v. Agra Bank*, 1866, L. R. 2 Eq. 674) nor an express charge can extend to further advances made after notice that the property sought to be charged belongs, or is mortgaged, to a third person (*London and County Bank v. Ratcliff*, 1881, 6 App. Cas. 722; *Bradford Banking Co. v. Briggs*, 1886, 12 App. Cas. 29). Pledges of negotiable securities, or securities treated by the market as negotiable (*Bentink v. London Joint-Stock Bank* [1893], 2 Ch. 120), to a bank, which lends money upon the faith of them, *bonâ fide* and without notice that they are the property of a third person, pledged without his authority, can be held as security by the bank against the owner, and this notwithstanding that the securities are pledged in a block by a broker who in the common course is known to hold securities belonging to his principals (*London Joint-Stock Bank v. Simmonds* [1892], App. Cas. 201). The same rule applies to the proceeds of a cheque carried by the bank to the broker's account (*Thompson v. Clydesdale Bank* [1893], App. Cas. 282). The bank is entitled to realise its securities (*Donald v. Suckling*, 1870, L. R. 1 Q. B. at p. 604).

6. *Deposited Property*.—The bank is a mere bailee of property deposited for safe-keeping by the customer, and if it receives no special remuneration for allowing the deposit, it is not liable for loss by the theft of a bank servant, provided that it took such care as a reasonable man would take of his own property (*Gibbin v. McMullen*, 1869, L. R. 2 P. C. 318); but if a commission is paid to it, a higher degree of care is required (*In re United Service Co.*, 1870, L. R. 6 Ch. 212). See BAILMENTS.

7. *Branches and Correspondents*.—Branch banks are merely agencies of the principal, although treated as distinct banks for purposes of notice of dishonour and payment of cheques (*Prince v. Oriental Bank*, 1878, 3 App. Cas. 325), so that accounts kept at different branches may be consolidated by the bank (*s. c.*; *Garnett v. McKewan*, 1872, L. R. 8 Ex. 10). If a correspondent bank collects moneys for a bank upon its customer's account, the bank is liable for the receipts, for the correspondent is not the customer's agent but the bank's (*MacKersy v. Ramsay*, 1843, 9 Cl. & Fin. 818).

8. *Change of Banking Firm*.—The transfer of money from deposit to current account is equivalent to drawing out the money and paying it in again, so as to discharge the liability of a retired partner in the bank (*Head v. Head* (No. 2) [1894], 2 Ch. 236); but accepting a new deposit note is not

a novation which effects such a discharge (*Head v. Head* (No. 1) [1893], 3 Ch. 426).

See CHEQUE; LETTER OF CREDIT; CIRCULAR NOTE.

Banks and Banker.—As to the privileges of the Bank of England in regard to the issue of notes and dealing in bills payable to bearer on demand, see BANK OF ENGLAND.

The Companies Act, 1862, s. 4, prohibits any company or partnership of more than ten persons, to be formed after the 7th August 1862, for the purpose of carrying on the business of banking, unless it is formed under the Act, or under some other Act of Parliament, or under letters-patent. The Act permits existing banking companies or partnerships to register under it (s. 188; Companies Act, 1874, ss. 4 and 10). Companies so registered must publish half-yearly statements of their capital, shares issued, and calls made, liabilities and assets (s. 44), and must have their accounts audited half-yearly (Companies Act, 1879, ss. 7 and 8). A bank of issue registered under the Companies Acts remains unlimited as to the liability of its members in respect of its notes (Companies Act, 1877, s. 6). As to the declaration of dividends by a banking company, see *Lubbock v. British Bank of South America* [1892], 2 Ch. 198.

A number of earlier statutes are still in force, under which some existing joint-stock banks were provided, and by which they are still governed (see Walker on *Banking Law*), but the most of the larger banks, after the failure of the City of Glasgow Bank, registered under the Act of 1879. The Acts in general enable the banks to sue and be sued in the name of their public officers (County Bankers Act, 1826, s. 9; 1 & 2 Vict. c. 96; 7 & 8 Vict. c. 113, s. 47).

Bankers and banking companies are required once every year to make a return of the name, residence, and occupation of every member of the firm (Bank Charter Act, 1844, s. 21), unless they make returns of their shareholders to the Registrar of Joint-Stock Companies (45 & 46 Vict. c. 72, s. 11); and all banks of issue are required to make weekly returns of their notes in circulation (Bank Charter Act, 1844, s. 18). As to embezzlement of money or securities intrusted to a banker for a specific purpose, and the conversion to his own use by a banker of property intrusted to him for safe custody, see 24 & 25 Vict. c. 96, ss. 75 and 76. See also BANK BOOKS; BANK HOLIDAYS; BANK SHARES; and BANKER AND CUSTOMER.

Bankruptcy.

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HISTORICAL INTRODUCTION.

The problem of insolvency is one which has presented itself in all countries and all ages. In early communities the strict law of debtor and creditor is left to take its course; and harsh as that solution is, it has at least the merit of maintaining a high standard of integrity. The possibility of getting rid of debts by bankruptcy, or a composition without paying them in full, undoubtedly relaxes a debtor's moral fibre. Hence, at the time of the French Revolution, the National Convention passed a resolution that any man who contracted a debt should never be free from liability to pay it,—a resolution commendable as a counsel of perfection, but, as legislation for the France of the eighteenth century, an anachronism. The principle which the resolution of the French Convention embodied has been, however, the principle of most, if not all, primitive communities: a man had to pay his debts to the uttermost farthing; and if he could not pay with his property, he had to pay with his person, which, in societies where slavery prevailed, was an asset of some value. Nothing, as Sir Henry Maine observes, strikes the scholar and jurist more than this severity of ancient systems of law towards the debtor, and the extravagant powers which they lodge in the creditor. It brought many early States to the brink of ruin. In Athens a revolution was only averted by Solon's *seisachtheia* and the abolition of enslavement for debt. At Rome, after long internecine struggles, the *Lex Prætorum* at last permitted a citizen to save his liberty by pledging his oath that he was solvent; but for the insolvent debtor there was still no mercy—such was the sanctity of contract in Roman eyes. It was not until the time of Julius Cæsar that a debtor became entitled to his discharge on formally giving up everything to his creditors—*cessio bonorum*. This *cessio bonorum* marks the commencement of the true principle of bankruptcy.

The early Teutonic codes exhibit the same Draconian severity as those of Rome and Greece. The insolvent debtor falls under the power of his creditor, and is subject to personal fetters and chastisement; and later on, among the Germans, the *witepeow* might often be seen working out by his labours a debt that was due to his master. It is not a little remarkable, as Sir Frederick Pollock and Professor Maitland observe, *apropos* of the above (*History of English Law*), that our common law knew no process whereby a man could pledge his body or liberty for payment of a debt; neither at common law was the body of the debtor liable to execution for debt, except in the case of the king's debtor. It is interesting to observe how imprisonment for debt came about. No right of arrest on a judgment in debt is given by the express

words of any Statute, but the law gave in certain cases a right to arrest a delinquent or defaulter for the purpose of securing his appearance at trial, where, for instance, he was flying the realm; and it came to be held, by some strange mediæval logic, that wherever the law gave this right of arrest on *mesne process*, a *capias ad satisfaciendum* would lie upon the judgment itself (1795, 3 Salk. 286). Thus began the long and dreary annals of bailiffs, sponging-houses, the Marshalsea, and the Fleet.

The ordinary law of debtor and creditor, though it may suffice in early times for private individuals, soon shows itself inadequate to meet the case of the insolvent trader, and more particularly the fraudulent trader. The private individual's transactions are (or were) simple. Not so the trader's. In the trader there centres a network of legal and commercial rights and obligations, debts, credits, contracts, loans, options. To allow the assets which these represent to be scrambled for by creditors, under writs of execution, would work most woful injustice. Accordingly, some system of administration becomes, at a certain stage in the history of all civilised States, a necessity for traders in the first instance, afterwards for debtors generally; and, in obedience to this necessity, we find in our own country, running side by side with the ordinary law of debtor and creditor, a long series of bankruptcy enactments. There have been no less than thirty-eight Bankruptcy Acts in the last three hundred and fifty years, each Act adding its stone to the building of the finished fabric. The first rude foundation of bankruptcy law is laid by the Statute 34 & 35 Hen. VIII. c. 4, "Against such as do make Bankrupt."

This Statute recites that "divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity, and good conscience." What the law had its eye upon here was evidently fraudulent debtors. For redress, the Lord Chancellor, Lord Treasurer, the Chief-Justices of either Bench, and others of the Privy Council, are by the Act empowered, on complaint, "by their wisdoms and discretions" to take the offender, his lands, tenements, annuities, and offices, as well as his money, goods, chattels, wares, merchandise, and debts, wheresoever they may be found, and to sell them for satisfaction of the creditors; "that is to say, to every of the said creditors a portion, rate and rate alike, according to the quantity of their debts." Here is bankruptcy in embryo.

Still the evil grew, and to meet it, Parliament, in 13 Eliz. c. 7, expanded the provisions of Hen. VIII., defining with more precision acts of bankruptcy, and enlarging the power to examine persons. Then 1 Jac. I. c. 15, added another stone—the first bankruptcy legislation against voluntary settlements. Here, too, is enacted a penalty from which our modern bankrupt may congratulate himself on having escaped, namely, "if convicted of perjury on his examination, of having to stand upon the pillory in some public place, by the space of two hours, and have one of his ears nailed to the pillory, and cut off." 21 Jac. I. c. 19, is still more severe, for the debtor who "renders not some just reason why he became bankrupt" is treated to the same discipline of the pillory and ear-cropping. Here, too, appears, for the first time, the reputed ownership doctrine. As a side-light on the subject, we may note that in the procession of the "Seven Deadly Sins" of Dekker the dramatist, as they appear drawn in seven several coaches through the seven several gates of the City, bringing the plague with them. Fraudulent

Bankruptcy takes the lead. Charles II.'s reign and Anne's go on with the building. Then 7 Geo. I. c. 31, adds another important stone, making debts payable at a future day provable. 5 Geo. II. c. 30, makes a bankrupt's not submitting to be examined, or concealing goods to the value of £20, felony, without benefit of clergy, and begins the anti-gambling legislation in bankruptcy. Any debtor who has lost £15 in one day over cards, dice, tennis, billiards, shovel-board, cock-fighting, and so on, loses the benefit of the Act. Here, too, appears the mutual debts and credit for the first time. Then in 46 Geo. III. c. 135, come the "protected transactions"; and, with 6 Geo. IV. c. 16, the principle of deeds of arrangement. 1 & 2 Will. IV. c. 56, first introduces on the scene a Court of bankruptcy and the official assignee. All this time, it must be remembered, down, that is, to the beginning of the present century, and for some years later, the privileges of bankruptcy were confined to traders. For non-traders the old harsh law of debtor and creditor still ruled, but in 1813 began a series of Acts (53 Geo. III. c. 110; 7 Geo. IV. c. 57; 1 and 2 Vict. c. 110; and 5 & 6 Vict. c. 116), known as the Relief of Insolvent Debtors Acts, designed, as the preamble of the last Act states, to "protect from all process against the person, such persons as have become indebted without any fraud, or gross or culpable negligence, so as, nevertheless, their estates may be duly distributed among their creditors." From this it was but a step to extend the law of bankruptcy—as the Act of 1861 did—to non-traders.

The Bankruptcy Acts, from the Statute of Henry VIII. to the Acts of to-day, are, as all legislation must be, a series of experiments. They are a building up and a pulling down—readjustments to the changing conditions and sentiments of the community—more especially the commercial community. The chief characteristic of the later Acts—the Acts of 1849, 1861, and 1869—is an oscillation in the mode of administration between the opposite principles of private and of official administration, the methods of now one, now the other predominating—a reflection of the eternal conflict between individualism and socialism. In the Acts of 1849 and 1861 officialism was in the ascendant. Then, in the Act of 1869, the pendulum swung back in favour of a creditors' administration. In the Act of 1883 we have the Legislature, pressed with the abuses of creditors' administration, reverting to officialism in a very pronounced form, but seeking, at the same time, to combine with it the advantages of a creditors' administration—consulting, that is to say, the wishes of the creditors as far as possible in all matters of management and realisation. "The estate for the creditors," not for the debtors, nor for the trustee, is its motto. This is one salient feature of the Act. The other is its disciplinary character. The Act of 1883 recognises, for the first time, that the trading methods and conduct of a debtor are not matters merely between him and his creditors, but concern the interests and welfare of the whole trading community and of the State. To this end—the inculcation of a high standard of commercial morality—a large number of the provisions of the Act are directed.

ACTS OF BANKRUPTCY.—The Legislature has, in the Bankruptcy Act, 1883, defined fully and precisely what acts or defaults by a debtor are to render him amenable to the bankruptcy laws, that is, to have his property taken into the possession of the Court, and equitably distributed *pro rata* among his just creditors. These acts and defaults, which embody the results of a long experience, dating back to the reign of Elizabeth, are defined by the Act of 1883, and are commonly known, as "acts of bankruptcy." They are not confined to acts or defaults which are indicia of insolvency; they embrace acts and defaults which evince (for instance) an intention on

the part of the debtor to deprive his creditors of their remedy against his person, as by departing out of England, or evince an intention on the part of the debtor to deprive his creditors of their remedy against his estate, as by making a fraudulent conveyance of his property. Any of these, if unexplained, evidences a condition of things which, in the opinion of the Legislature, entitles a creditor, with a sufficient interest, to apply to the Court for protection. As these statutory acts of bankruptcy, and these only, for the category is exhaustive, are the basis of all proceedings in bankruptcy, it is desirable to state them in the very words of the Act (s. 4)—“A debtor,” which means not a debtor all the world over, but a debtor who is subject to the law of England (*In re Pearson*, 1892, 9 Mor. Bky., 185, 189) “commits an act of bankruptcy in each of the following cases:—

“(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees, for the benefit of his creditors generally:

“(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof:

“(c) If in England or elsewhere he makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon which would, under this or any other Act, be void, as a fraudulent preference, if he were adjudged bankrupt:

“(d) If, with intent to defeat or delay his creditors, he does any of the following things, namely, departs out of England, or, being out of England, remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house:

“(e) A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods, under process, in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days: Provided that, where an interpleader summons (see INTERPLEADER) has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out, and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days (substituted by sec. 1 of Bankruptcy Act, 1890):

“(f) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself:

“(g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt, in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand, which equals or exceeds the amount of the judgment-debt, and which he could not set up in the action in which the judgment was obtained. Any person who is for the time being entitled to enforce a final judgment shall be deemed a creditor who has obtained a final judgment, within the meaning of sec. 4 of the principal Act (Bankruptcy Act, 1890, s. 1):

“(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.”

One further act of bankruptcy must be added. A judgment debtor is to be deemed to have committed an act of bankruptcy, if the Court, upon application for his committal, under sec. 5 of the Debtors Act, makes a receiving order against him under sec. 103 (5) of the Bankruptcy Act, 1883. Before examining these acts of bankruptcy in detail, it should be observed that words defining acts of bankruptcy are, as Lord-Justice Bowen said (*Ex parte Chinery*, 1884, 12 Q. B. D. 342, 346), to be construed as strictly as if they occurred in a section defining a misdemeanour, because the commission of an act of bankruptcy entails disabilities on the person who commits it.

Group 1 (a) (b) (c) of the acts of bankruptcy enumerated in this section may be summarised as fraudulent dispositions of property. A conveyance or assignment by a debtor of his property to a trustee, for the benefit of his creditors generally, need not, it is true, be fraudulent in a moral sense, but it tends, nevertheless, to defeat and delay creditors, and for that reason—independently of its being an admission of insolvency—has always been treated as an act of bankruptcy. The Act probably means his whole property, though it does not say so (*In re Spackman*, 1890, 24 Q. B. D. 728, 738), but a debtor cannot evade the operation of the section by a colourable exception of a small part. It is enough that the property alienated is substantially the whole. Nor need the conveyance or assignment be made—as was formerly the law—in England. It is available as an act of bankruptcy under the words “or elsewhere,” though made abroad, provided the debtor is subject to the English law.

The words “fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof”—words reproduced in substance in every Bankruptcy Act since the beginning of this century—have been subjected to a close examination.

It is observable that the words “with intent to defeat and delay creditors,” which appeared in the Acts prior to that of 1869, have been dropped—deliberately, and for a very good reason, that intent is immaterial. The question is, is the effect of the conveyance, gift, etc., a fraud on creditors? To determine this, the particular transaction in each case must be looked at. A sale, for instance, of the whole of a trader's property is not fraudulent. The consideration is there. The property has only changed its form. The same principle applies to the case of a mortgage of the whole of a debtor's property, in the ordinary course of business. If it is partly given for a past debt, and partly as a security for a present advance—a substantial advance—if there is a fair present equivalent in fact, in money, or something else of value, the transaction is not necessarily—as a conclusion of law—fraudulent. The advance prevents the assignment covering the whole of the debtor's property. The amount of the further advance is not, however, the test. The test is whether the mortgage or charge was made *bond fide* for the purpose of enabling the debtor to continue his business (*In re Chapman*, 1884, 26 Ch. D. 238, 347; *Ex parte Ellis*, 1876, 2 Ch. D. 797; *Ex parte Threllfall*, 1877, 35 L. T. 675; *Re King*, 1872, 2 Ch. D. 256), or was a mere scheme to obtain payment of the existing debt. An agreement to make future advances will do (*Ex parte Sheen*, 1876, 1 Ch. D. 560), if *bond fide*, though not legally binding (*In re Berry*, 1883, 22 Ch. D. 788). After-acquired property, being included in the assignment, does not render it an act of bankruptcy.

To constitute a fraudulent preference—the last of this group of acts of bankruptcy—the debtor must, first of all, be unable to pay his debts as they become due; and, secondly, giving a preference must be the debtor's

dominant view (*In re Bird*, 1883, 23 Ch. D. 695), though it need not be his sole view. Fraudulent preference will be dealt with more fully later on.

Departing out of England.—If the alleged act of bankruptcy is the debtor departing out of England, or remaining out of England, or departing from his dwelling-house, or otherwise absenting himself, or beginning to keep house, the intent must be proved as a matter of fact, depending on all the circumstances, as Buller, J., says in *Williams v. Nunn*, 1814, 1 Taun. 270, 275; *In re Parr*, 1821, 1 Rose, 387, and not as a mere conclusion of law—as much (so James, L. J., observes, in *Ex parte Meyer*, 1871, L. R. 6 Ch. 188) as in any criminal case where the intent is necessary to constitute the crime. A man being pressed by debts at the time is not conclusive (*In re Parr*, *supra*). If the intent is proved, it is immaterial that no creditor was in fact defeated or delayed. A man going out of England merely to escort his wife and family to Paris and returning immediately is not absenting himself (*Ex parte Lopez*, 1871, L. R. 6 Ch. 894), nor does a foreigner returning to his own country raise a presumption of intention to defeat and delay (*In re Crispin*, 1873, L. R. 8 Ch. 374). In case of departing, the intention must be present at the instant of departure. Thereupon the act of bankruptcy is complete, irrespective of the duration of the absence (*Ex parte Gardner*, 1818, 1 Ves. & Bea. 45), but “remaining abroad,” with intent to defeat and delay creditors, is an act of bankruptcy, whatever may have been the motive originally of departing (*Ex parte Bunny*, 1857, 1 De G. & J. 309; *In re Campbell*, 1887, 4 Mor. 198).

Otherwise absents himself.—The cases on this may be summed up by saying that a man’s intentionally keeping away from any place where he would, in the ordinary course of things, be found, is absenting himself. If, for instance, a debtor says, time after time, “I will meet you at a public-house, or such and such a place, at such and such a time, and pay you money,” and he is not there, that is an act of bankruptcy (*Russell v. Bell*, 1843, 10 Mee. & W. 340), but a debtor promising to call at an appointed time on his creditor and pay the debt, and failing to keep such an appointment, is not, by itself, an absenting himself, so as to constitute an act of bankruptcy (*Ex parte Meyer*, 1872, L. R. 7 Ch. 188). The absenting need not be corporeal. A lady debtor disguising herself, for instance, under an *alias*, has been held to be an absenting of herself and an act of bankruptcy within the section (*In re Alice Alderson* [1895], 1 Q. B. 183). The rationale of the thing is that the debtor in such a case makes it impossible for his creditors to ascertain his whereabouts. “Keeping house” is defined by Wharton as a man’s confining himself within the privacy of home to defeat creditors. A debtor telling his boy, for instance, to say to an agent of his creditors that he is not at home, when the agent sees the debtor through a glass partition, is the beginning of keeping house (*Ex parte Banford*, 1806, 13 Ves. 449).

Execution levied.—The next act of bankruptcy—“(e) Execution levied”—is defined by the Bankruptcy Act, 1890 (superseding the corresponding section of the Act of 1883). Execution followed by sale, or remaining unsatisfied for twenty-one days, raises a *prima facie* case of insolvency, which may reasonably entitle a creditor to invoke the protection of the bankruptcy law. It is to be noticed that the execution need not be for any particular amount, as, for instance, for £50, as was the case under the Act of 1869, and there is no restriction on the word debtor. The section applies to all debtors (*In re Farnham* (No. 1), 1895, 3 Manson, 109, 117). The twenty-one days mentioned is of course exclusive of time spent in interpleader proceedings, and also of the day of seizure (*In re North* [1895], 2 Q. B. 264). It has been decided that an originating summons for leave to issue execution to enforce

an award, under s. 12 of the Arbitration Act, 1889, is a "civil proceeding" within the meaning of the Act (*Ex parte Caucasian Trading Corporation* [1896], 1 Q. B. 368).

A debtor filing a declaration of his inability to pay his debts, or presenting a petition against himself, requires no comment. It must be in the form given in No. 3 of the appendix. The filing of the declaration contemplated by the Statute is complete when it is delivered by a properly authorised person to the proper officer, at the proper office, with intent that it should be filed or placed upon record in the ordinary manner (*Ransford v. Maule*, 1873, L. R. 8 C. P. 672).

The seventh of the acts of bankruptcy enumerated in s. 4 (g) is non-compliance with a bankruptcy notice. This process is by far the most common foundation of bankruptcy proceedings, and demands, therefore, careful attention. A bankruptcy notice can only issue on the application of a creditor, who has obtained a final judgment on which execution has not been stayed. This now includes (B. A., 1890, s. 1) any person entitled to enforce a final judgment, *e.g.* an assignee. What is a "final judgment" is a question which has been very elaborately discussed in the Courts. The words, as quasi-penal, must be strictly construed. A final order, for instance, is not a final judgment (*In re Cohen*, 1884, 12 Q. B. D. 509), nor is a garnishee order absolute (*In re Chinery*, 1884, 12 Q. B. D. 342), nor a balance order for calls (*Ex parte Whinney*, 1884, 13 Q. B. D. 476), nor is a decree in a divorce suit for dissolution of marriage, containing an order for the payment of the petitioner's costs by the co-respondent (*In re Binstead* [1893], 1 Q. B. 199), because such a suit is one in which the debtor cannot raise a set-off or counter-claim. Final judgment must be obtained in an action. There must be a proper *litis contestatio*, and a final adjudication between the parties on the merits (see *per* Lord Selborne, *In re Faithfull*, 1885, 14 Q. B. D. 633; and *In re Binstead*, *supra*). A judgment against a defendant for costs may be final, though other parts of the judgment direct accounts or inquiries (*In re Faithfull*, *supra*; *In re Boyd* [1895], 1 Q. B. 611; and *In re a Bankruptcy Notice* [1895], 1 Q. B. 609). The judgment must, moreover, be one on which the creditor is in a position to issue execution (*In re Woodall*, 1884, 13 Q. B. D. 479), that is to say, not a judgment on which execution has been stayed, either expressly or by the pendency of interpleader proceedings (*In re Follows* [1895], 2 Q. B. 521; *In re Ford*, 1887, 18 Q. B. D. 369). For the same reason, an executor of a judgment-creditor cannot serve a bankruptcy notice till he has got leave to issue execution (*In re Woodall*, 1884, 13 Q. B. D. 479; R. S. C., Order 42, r. 23). It must also be remembered that even where a creditor has obtained "final judgment," in the strict sense of those words, such judgment does not conclude the Court of Bankruptcy: for that Court has, by its equitable jurisdiction, power to go behind the judgment, and inquire whether the debt is a real debt, or whether the judgment was obtained by collusion or fraud (*In re Lennox*, 1881, 16 Q. B. D. 315). Of this more anon. Assuming a creditor, however, to have a final judgment, entitling him to issue a bankruptcy notice, his proper course is to apply either himself, or by his solicitor, to the Court—any Court, that is, in which a bankruptcy petition against the debtor might be filed—for the issue of such a notice, and, with the request, produce to the registrar of the Court an office copy of the judgment, filing request and notice. The bankruptcy notice must be in form 6 in the appendix to the Act, and must be strictly in accordance with the terms of the judgment. If misleading, it will be set aside (*In re Howes* [1892], 2 Q. B. 628). It must also have indorsed on it an intimation to the debtor that if he has a counter-

claim, set-off, or cross-demand, he must, within three days (if the bankruptcy notice is served in England) file an affidavit to that effect with the registrar (B. R., 138 (2)), and for this purpose the address given by the creditor must be one where the sum can be paid by the debtor, not merely an address where the creditor can be heard of, such as his club (*In re Stogden* [1895], 2 Q. B. 534). A married woman, though amenable as a trader to the bankruptcy law, cannot be served with a bankruptcy notice, because the form of the notice, which implies a personal liability, will not fit in with the common form of judgment against a married woman (*In re Lynes*, 1893, 10 Mor. 124), and it makes no difference that she has since the date of the judgment become a widow (*In re Hewett*, 1894, 1 Manson, 517). Where a debt is due to a company in winding-up, and the liquidator desires to serve a bankruptcy notice, the notice must be in the name of the company, and headed *Ex parte the Company*, not in the name of the liquidator (*In re Bassett*, 1895, 2 Manson, 177). Two judgment debts cannot be included in the same bankruptcy notice (*In re Low* [1891], 1 Q. B. 147). A bankruptcy notice is to be served like a petition (see *infra*). If served in England, it must be served within one month from the date of issue (B. R. 140). Service on a receiver and manager of a business appointed by the Court is not good service on the partners (*In re Flowers & Co.*, 1896, 3 Manson, 294). It would seem, from a recent decision of the Court of Appeal, that a debtor resident and domiciled abroad may be served with a bankruptcy notice, if he comes to England, though he could not be served with a bankruptcy petition (*In re Clark* [1896], 2 Q. B. 476). After a debtor has committed an act of bankruptcy, by non-compliance with a bankruptcy notice, any creditor of the debtor may present a petition against the debtor, and not only the creditor who has served the notice; and this, notwithstanding that the debtor has in the meanwhile paid the original creditor's debt (*In re Harding*, 1885, 14 Q. B. D. 184; *In re Powell* [1891], 2 Q. B. 324).

(h) The last of the statutory acts of bankruptcy—"If a debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts"—has caused much difficulty, involving, as it does, the construction of notices and circulars of all sorts by embarrassed debtors. The leading case is *In re Crook*, 1890, 24 Q. B. D. 324; [1891], App. Cas. 316; and the test it lays down is, "What effect would the circular produce on the mind of a creditor receiving it?" If the inference which such a creditor would naturally draw is, that if the debtor's offer is not accepted suspension must follow, that is an act of bankruptcy within the section (*In re Lamb*, 1887, 4 Mor. Bky. 25). The notice must be a formal one, but it need not be in writing (*In re Friedlander*, 1884, 1 Mor. Bky. 207). The latest cases on the subject are *In re Lord Hill's Trustees v. Rowlands* [1896], 2 Q. B. 124; and *In re Scott*, 1896, 3 Manson, 102.

It is not, however, every debtor, though subject to the laws of England, who can be made a bankrupt in respect of the above acts of bankruptcy. An infant, for instance, cannot be made a bankrupt merely because he trades (*Lovell v. Beauchamp* [1894], App. Cas. 607). There seems, however, no reason why he should not be made a bankrupt in respect of debts for necessities (*Ex parte Jones*, 1881, 18 Ch. D. 109). A married woman may now be made a bankrupt if she carries on a business separately from her husband (Married Women's Property Act, 1882, s. 1 (5); *In re Armstrong*, 1886, 17 Q. B. D. 521)—as she always could, by the custom of the City of London (*Laure v. Phillips*, 1812, 3 Burr. 1776); and she cannot evade the liability by discontinuing the business, if there are debts contracted in it which are still unpaid (*In re Dagnall* [1896], 2 Q. B. 407). As to what is carrying on

business separately from her husband, see *In re Helsby*, 1894, 63 L. J. Q. B. 261; *In re Edwards*, 1895, 2 Manson, 182. A bankruptcy notice, as has been already said, is not available against a married woman, owing to the peculiar form which judgment against her takes. See HUSBAND AND WIFE.

It is doubtful whether a lunatic can be made bankrupt. The Court of Appeal had an opportunity lately (*In re Farnham* (No. 1) [1896], 2 Ch. 799) of resolving the doubt, but with characteristic caution decided to leave it unsolved a little longer. The Court has, however, given leave to a lunatic's committee to file a petition on behalf of the lunatic (*In re James*, 1884, 12 Q. B. D. 332), and also to consent to an order of adjudication against the lunatic (*In re Lee*, 1883, 23 Ch. D. 216). Bankruptcy is a privilege, and there is no reason why it should be denied to lunatics. A company or corporation cannot be proceeded against under the Act (B. A., s. 123), winding-up being the appropriate remedy. As to partners, see *infra*. A felon may be made a bankrupt (*In re Harris*, 1882, 19 Ch. D. 1).

THE PETITION.—The mode of putting in force the bankruptcy law is by petition; but before the creditor takes this step, he must be careful to see that he fulfils the conditions prescribed by the Act (s. 6) for presentation of a petition. These conditions are four:—

1. The debt, or, if there are several creditors joining, the aggregate of the debts, must amount to £50.

2. The debt must be a liquidated sum, payable either immediately, or at some certain future time.

3. The act of bankruptcy on which the petition is grounded must have occurred within three months, that is calendar months, before the presentation of the petition, exclusive of the day on which it is presented.

4. The debtor must be domiciled in England, or must, within a year before the date of the presentation of the petition, have ordinarily resided, or had a dwelling or place of business, in England.

All these conditions have been the subject of much judicial consideration. It has been well settled, for instance, that the petitioning creditor's debt must be one which has accrued due before the act of bankruptcy founding the petition (*Ex parte Thomas*, 1747, 1 Atk. 73). A good illustration of this rule is furnished by the case of *In re Whelan*, 1879, 48 L. J. Bky. 43. There a creditor brought his action for a debt of £49, 11s. 7d. The debtor entered an appearance, and the same day committed an act of bankruptcy. Subsequently, the creditor signed judgment for his claim, which, with costs, amounted to over £50. It was held that this would not support a petition. The debt must also continue to exist down to the date of the receiving order (see *In re Hammond*, 1873, L. R. 16 Eq. 614, 618). If, for instance, a creditor who has served a bankruptcy notice receives a bill for the amount of the debts from the debtor, that is conditional payment and satisfaction (*In re Matthew*, 1884, 1 Mor. Bky. 47), and an answer to the petition. The debt may be a debt due at law or in equity. It may also be a debt payable at some future time. Thus a bill of exchange may constitute a good petitioning debt, though it has not matured (*In re Barr*, 1896, 3 Manson, 97). This was not so under the Act of 1869. But the debt must be a liquidated sum, and it must not be statute-barred (*Ex parte Tynte*, 1880, 5 Ch. D. 125), or founded on an illegal consideration.

The third statutory condition, (1) (c), is that the act of bankruptcy on which the petition is grounded must have occurred within three calendar months before the presentation of the petition, which means exclusive of the day on which the petition is presented (*In re Hanson*, 1887, 4 Mor. Bky. 98). The limit has been reduced successively from twelve months to six,

and from six to three. Clearly, a person ought not to be kept with a bankruptcy petition hanging over his head longer than can be helped.

The last statutory condition is, that the debtor "is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England." See DOMICILE. It is not the policy of our law to administer the estates of foreign debtors. If, however, a foreigner trades in England, and commits an act of bankruptcy in England, he is subject to the bankruptcy law here. A domiciled foreigner, who took furnished rooms in London for three months while prosecuting an action here, and lived in them with his wife and children, was held to have a "dwelling-house" here (*In re Hecquard*, 1890, 24 Q. B. D. 71); so was a foreigner who had for eighteen months previously to the petition occupied a room at a London hotel (*In re Norris*, 1887, 5 Mor. Bky. 111). The onus of proving an English domicile is, in the first instance, on the petitioning creditor (*In re Cuning*, 1884, 13 Q. B. D. 418).

A creditor's petition must be in the form No. 10, in the Appendix of Forms to the Act. It may be written or printed, or partly written and partly printed. It must be sealed (B. R. 14) and attested. No alterations, interlineations, or erasures are to be made without leave of the registrar. The petition must be verified by the affidavit of the creditor, or of some person on his behalf having knowledge of the facts, and when it is filed there are to be lodged with it two or more copies, to be sealed and issued to the petitioner. Upon presentation, the petitioner is to deposit with the official receiver £5, to cover fees and expenses to be incurred by the official receiver. A petition being presented by inadvertence in the wrong Court, may still be heard (*In re Brightmore*, 1884, 1 Mor. Bky. 253). Once presented, the petition cannot be withdrawn without the leave of the Court. As a rule, a creditor's petition is not to be heard until the expiration of eight days from service, but there are exceptions, as where the debtor has filed a declaration of inability to pay debts or has absconded (B. R. 157). A creditor's petition is to be personally served by delivering to the debtor a sealed copy of the filed petition. It is to be served upon the debtor by an officer or bailiff of the Court, or by the creditor, or his solicitor, or some person in their employ, and service of the petition is to be proved by affidavit with a sealed copy of the petition attached, which is to be filed in Court forthwith after the service. If a debtor against whom a bankruptcy petition has been presented, dies, the proceedings are to be continued, unless the Court otherwise orders (B. R. 108). A merely formal defect or irregularity is not to invalidate any proceeding in bankruptcy (B. A., s. 143), but there is a broad distinction, as was said by Lord-Justice Lopes, "between an irregularity that may prejudice or embarrass the party complaining of it, and an irregularity which is purely technical and cannot have any injurious effect" (*In re Low* [1895], 1 Q. B. 734; *In re Bates*, 1887, 4 Mor. Bky. 192). In the former class of cases the Court will not allow an amendment. Thus it has been held fatal to a petition that the bankruptcy notice claimed £45 more than was due (*In re Miller*, 1893, 10 Mor. Bky. 183). An infant may present a bankruptcy petition (*Ex parte Brocklebank*, 1877, 6 Ch. D. 358). So may a married woman, as a *feme sole*. A company registered under the Companies Act, 1862, petitions by its secretary (*In re Whitley*, 1891, 8 Mor. 149). An executor may present a petition (*Ex parte Paddy*, 1819, 3 Madd. 241), but he must obtain probate before adjudication (*Rogers v. James*, 1819, 7 Taun. 147). A trustee may petition, but if he is bare legal trustee for an absolute beneficial owner, he must join such beneficial owner (*In re Adams*, 1878, 9 Ch. D. 307; *In re Hastings*, 1885,

14 Q. B. D. 184), the reason being that the debtor might have a good defence as against the *cestui-que trust*, though not against the trustee, but this does not apply if the beneficial owner is a person under disability. If the trustee is also beneficial owner of enough of the debt to support a petition, he need not join the owner of the other part (*In re Gamgee*, 1891, 8 Mor. Bky. 182). The Queen's proctor may present a petition in respect of taxed costs ordered to be paid him (*Ex parte Rayner*, 1878, 37 L. T. 38). A surety can only petition against his co-surety when he has paid more than his share of the debt remaining due to the creditor (*In re Snowdon*, 1881, 17 Ch. D. 44), for until then he has no legal or equitable debt. A receiver appointed by the Court to get in outstanding assets cannot, however, present a bankruptcy petition against a person who has such assets in his hands, for the receiver is not a "creditor" within ss. 5, 6 (1) of the Bankruptcy Act, 1883. There is no debt due to him personally. He is the mere hand of the Court (*In re Sacker*, 1889, 22 Q. B. D. 179; *In re Muirhead*, 1876, 2 Ch. D. 22). If the receiver is the holder of a bill of exchange on which the debtor is liable, he is then a creditor *quâ* holder, not *quâ* receiver, and can petition (*Ex parte Harris*, 1876, 2 Ch. D. 423). A secured creditor cannot petition unless he is willing to give up his security, or to value it and petition for the balance (B. A., s. 6 (2)). A creditor who has been party or privy to a deed of assignment by a debtor, for the benefit of his creditors, cannot avail himself of the assignment as an act of bankruptcy. It would be inequitable (*In re Stray*, 1866, L. R. 2 Ch. 374; *In re Adamson, Ex parte Viney*, 1895, 2 Manson, 153). If a bankruptcy petition is presented for a purpose foreign to the bankruptcy law—to extort money, for instance (*In re Otway* [1895], 1 Q. B. 812), or maliciously (*Lecompte v. Jacobs & Miller*, 6th Nov. 1896), the Court will dismiss it, as an abuse of the process of the Court, or restrain its presentation.

PROCEDURE ON PETITION.—When a bankruptcy petition is presented against a debtor, and he intends to show cause against it, his proper course is to file a notice with the registrar, specifying the statements which he intends to deny or dispute, and to transmit by post to the petitioning creditor and his solicitor, if known, a copy of the notice three days before the day on which the petition is to be heard (B. R. 160). Thereupon, at the hearing, the petitioning creditor is put to prove his debt and the act of bankruptcy or such of the matters as the debtor disputes (B. R. 162), and for this purpose the statutory affidavit verifying the statements of the petition is not sufficient (*In re Sanders*, 1894, 1 Manson, 382). The statutory affidavit is nothing more than a guarantee of the *bona fides* of the petition. The petitioner ought, therefore, to go armed with proof of all essential matters, *e.g.*, if the petition is by the secretary of a company, of the secretary's authority to present it (*In re Sanders, supra*), or of the debtor's domicile, if likely to be challenged (*In re Barne*, 1886, 16 Q. B. D. 522). It is furthermore the duty of the petitioning creditor, and has always been, to attend at the hearing of the petition. Bankruptcy is a very serious matter. The petition, and the receiving order which lead up to it, are very serious too, and the petitioning creditor ought therefore to be present—whether he is a witness or not—to answer questions put to him by the Court or by the debtor (*In re Purrett*, 1895, 2 Manson, 403); and it makes no difference for this purpose that the petitioner's debt is a judgment debt, because the Court can and does go behind the judgment, if necessary, to satisfy itself that there is a real debt and not one obtained by collusion or fraud (*In re Lennox*, 1886, 16 Q. B. D. 315), or on a non-

enforceable contract, as for jewellery supplied to an infant (*In re Onslow*, 1875, L. R. 10 Ch. 373). Some evidence of collusion or fraud must, however, be given before the Court will go behind the judgment (*In re Flatau*, 1889, 22 Q. B. D. 83; *In re Saville*, 1887, 4 Mor. 277). The Court, if not satisfied of the debt, may dismiss the petition or stay proceedings on it, leaving the question of debt to be tried in an action, for a bankruptcy petition is not the proper mode of enforcing a disputed debt any more than a winding-up petition is in the case of a company.

Even if the debt is proved, a receiving order is not *ex debito justitiæ*, if the Court is satisfied that the debtor is able to pay his debts (B. A., s. 7 (3)), or that, for any other reason, an order ought not to be made. Where, for instance, the debtor being made a bankrupt would have the effect of forfeiting his life-interest,—the only asset,—as the petitioning creditor knew, the Court refused an order (*In re Otway* [1895], 1 Q. B. 812). So, if the Court is satisfied that there are and will be no assets, and that the only effect of a receiving order will be to heap up costs, the Court will not do what Jessel, M. R. (*In re Robinson*, 1883, 22 Ch. D. 816) called “a vain thing” (*In re Betts*, 1896, 3 Manson, 287; *In re Birkin*); but the Court will be very circumspect in dismissing a petition on the ground of “no assets,” because there is no knowing what the stress of the public examination and the machinery of discovery in bankruptcy may bring to light (*In re Leonard*, 1896, 3 Manson, 43). The debtor having only one creditor is an element to be considered by the Court, but it is no sufficient ground for saying that bankruptcy proceedings cannot be maintained against the debtor (*In re Hecquard*, 1890, 24 Q. B. D. 71). The mere fact that an appeal is pending from the judgment founding a bankruptcy notice is no ground for staying proceedings on the petition (*In re Flatau*, 1889, 22 Q. B. D. 83); but it is a matter for the discretion of the registrar in such a case whether he will make a receiving order or not (*In re Rhodes*, 1885, 14 Q. B. D. 49). If the petition is adjourned, there must be a further affidavit of the debt being due down to the date of the judgment (*In re Stables*, 1894, 1 Manson, 68).

If the debtor does not appear, the Court may make a receiving order on proof of the statements in the petition. If the non-appearance is due to an accident, the petition may be re-heard (*In re Phillips*, 1875, 44 L. J. Bky. 11).

DEBTOR'S PETITION.—A debtor may now present his own petition in bankruptcy, but this was not always the case. From an early period, however, Parliament had, as Mr. Justice Vaughan Williams pointed out in a recent case (*In re Painter*, 1894, 1 Manson, 499, 501), recognised that the State has an interest in a debtor being relieved from his liabilities—that he is not to be weighed down by a burden of indebtedness, so as to be incapacitated from discharging the duty of a citizen, and employing himself in honest industry. In pursuance of this policy, the law was gradually modified. First came the Acts for the Relief of Insolvent Debtors.

By the Bankruptcy Act of 1849, a trader was permitted to present a petition, but only if he showed assets to pay five shillings in the pound; and by the Act of 1861 the privilege was not to be used for any purpose foreign to the policy of the bankruptcy law. In the Act of 1869 no provision was made for a debtor presenting his own petition, perhaps because the Act contained abundant provision for liquidation. Whatever the reason, the Legislature has, in the Act of 1883, reverted to the policy of the Bankruptcy Act, 1861, and has done so without imposing any restrictions. “The Court,” says sec. 8, “shall thereupon” (i.e. presentation of the debtor's petition) “make

a receiving order." The above-mentioned case (*In re Painter, supra*) is a good illustration.

The debtor Painter was a retired police-constable, and was entitled to an inalienable pension, under the provisions of the Police Act. In addition to his pension, he was doing a profitable business as a private inquiry agent. In January 1894, Painter was sued in an action for slander by one Blizzard, and £290 damages were recovered against him. Painter did not pay the damages, and the plaintiff in the action obtained from the County Court an order for payment of the debt by monthly instalments; and on default by Painter, in payment of the first instalment, applied for an order of committal. Painter thereupon filed his own petition in bankruptcy, and was adjudicated a bankrupt, with assets £10, and no creditors other than the plaintiff in the slander action. The County Court judge annulled the adjudication, as an abuse of the bankruptcy law; but a Divisional Court, on appeal, reversed his decision and sustained the adjudication, notwithstanding the fact that it enabled the debtor to get rid of the punitive process of the Court against him, and enjoy his pension free from his debts and the provisions of the Debtors Act. This is a striking instance of the policy of the law, of freeing a debtor from his liabilities. The fact that the debtor comes to the Court to protect himself, for his own benefit, is no ground for refusing an adjudication, for a benefit to the debtor is not foreign to the objects of the bankruptcy law. The Court is not bound, however, to make a receiving order on a debtor's own petition, if such petition is an abuse of the process of the Court (*In re Bond*, 1887, 5 Mor. Bky. 146, 150).

Where a bankruptcy petition is presented by the debtor himself, it must be in form No. 4. By this form the debtor states that he is unable to pay his debts, and petitions the Court that a receiving order may be made in respect of his estate. The debtor must, besides inserting his name and description, and his present address, further describe himself as lately residing or carrying on business at the addresses at which he has incurred his unsatisfied debts (B. R. 144 (1)).

If a petitioning debtor has for the greater part of six months, next preceding the presentation of a bankruptcy petition, carried on business within the district of one Court, and resided within the district of another, the petition is to be filed in the Court of the district where he has carried on business (B. R. 144 (2)).

THE RECEIVING ORDER.—When an act of bankruptcy has been committed by a debtor, and a petition is presented by a creditor or debtor conforming to the statutory conditions, the Court may make what is called a receiving order, for the protection of the estate (s. 5). This receiving order is one of the novelties introduced into bankruptcy proceedings by the Act of 1883. In making such an order the Court lays its hand on the assets of the debtor, pending the determination by the creditors as to the mode in which the estate is to be administered, that is to say, whether in bankruptcy or under a scheme of arrangement in bankruptcy, officially or by a trustee of the creditors' own choice. The primary object of the receiving order is, as indicated by the section, the protection of the assets, protection not only from a further extravagance of the debtor or business risks, but also from creditors claiming title to his property.

The official receiver as the officer of the Court is entitled to possession, but his appointment does not divest the debtor (*In re Bonham*, 1883, 10 Ch. D. 595). He—the official receiver—is not, pending adjudication, owner or even occupier. He cannot, for example, demand a supply of gas to the

debtor's premises (*In re Smith* [1893], 1 Q. B. D. 323; *Rhodes v. Dawson*, 1886, 16 Q. B. D. 548). He is there only to protect and preserve the assets. For this purpose s. 9 of the Act provides that, after the making of such receiving order, no creditor with a provable debt shall have any remedy against the property or person of the debtor in respect of such debt, or is to commence any action or other legal proceeding unless with leave of the Court. The Court may also at any time, after presentation of a bankruptcy petition, stay any action, execution, or other legal process against the property or person of the debtor (s. 10 (2)). This suspension of the rights of creditors—which binds also the Crown (s. 150)—applies only, however, to creditors whose debts are provable in bankruptcy. Unliquidated damages in tort, for instance, are not provable in bankruptcy. Hence the Court will not, it would seem, restrain an action for a pure tort, *e.g.* an action of deceit, or indeed an action for any claim from which the debtor would not be released by an order of discharge (*In re Blake*, 1875, L. R. 10 Ch. 652). Nor does the section affect the rights of secured creditors to realise or otherwise deal with their securities; and for this reason, that a mortgagee realising his security is dealing with property which is his own, not the property of the debtor mortgagor at all. For the same reason a distress will not be restrained, the landlord being, *quoad* his right of distress, a secured creditor, and specially protected by sec. 42 of the Act. Where foreign creditors have taken proceedings in a foreign Court, an injunction will not usually be granted by an English Court to restrain them (*In re Chapman*, 1873, L. R. 15 Eq. 75), for the injunction in such a case would be ineffectual, and the Court does not stultify itself by making orders which it cannot enforce. If, however, the creditor suing in the foreign Court is an English subject resident in England, the Court acting *in personam* will restrain him (*In re Distin*, 1871, 24 L. T. 197); or if he has come in under the bankruptcy proceedings (*Ex parte Tait*, 1872, L. R. 13 Eq. 311). The section being one for the protection of the assets, it cannot be used for a purpose foreign to the policy of the Act. If a debtor, for instance, has been sent to prison under the Debtors Act, for default in paying money ordered to be paid by him as trustee, he cannot get himself discharged by committing an act of bankruptcy, and getting some one to present a bankruptcy petition against him (*Earl of Leves v. Barnett*, 1877, 6 Ch. D. 252). Even after a receiving order has been made against him, he may be imprisoned for a similar offence (*In re Smith, Hands v. Andrews* [1893], 2 Ch. 1; *In re Mackintosh*, 1884, 1 Mor. Bky. 84).

Any interference with a receiver is a contempt of Court (*In re Mead*, 1875, L. R. 20 Eq. 282). The sole exception is a landlord, in respect of his right of distress for six months' rent; the reason of this exception being that the receiver is appointed subject to landlord's rights, expressly reserved by the Act (*Ex parte Till*, 1873, L. R. 16 Eq. 97). See DISTRESS; LANDLORD AND TENANT.

A receiving order is made on the day it is pronounced, not from the time it is drawn up or perfected (*In re Manning*, 1886, 55 L. J. Ch. 613). The protection of the estate dates, therefore, from the pronouncement of the order. Notice of the order is to be gazetted, and also advertised in a local paper (Bankruptcy Act, s. 13) selected by the Board of Trade. This is done by the official receiver (B. R. 182).

In further aid of the policy of protecting the assets, the Court is empowered, at any time between the presentation of the petition and the receiving order, to appoint the official receiver interim receiver, and stay any action, execution, or other legal process against the property or person of the debtor. The Court may, however, allow them to continue. Any injunction

so granted is merely protective, and has no effect on the rights of creditors *inter se* (*In re Hall*, 1871, L. R. 6 Ch. 795).

STATEMENT OF AFFAIRS BY DEBTOR.—The first step consequent on the making of a receiving order is for the debtor to make out and submit to the official receiver a statement of his affairs, in the prescribed form. This statement of affairs, which is to be made out in duplicate and verified by affidavit, must show the particulars of the debtor's assets, debts, and liabilities, the names of his creditors, and the securities held by them respectively, in accordance with form 46. The official receiver commonly requests the attendance of the debtor at his office, to give him all the information he can. The Board of Trade furnish official receivers with a list of questions, numbered, for this purpose. The statement of affairs—which is a somewhat formidable document, or series of documents—is to be submitted, if the receiving order is made on the petition of a creditor, within seven days; if on the debtor's own petition, within three. If the debtor fails, without reasonable excuse, to submit it, he may be at once adjudicated a bankrupt.

The statement of affairs is the basis of all subsequent proceedings. Without it the public examination and the first meeting of creditors must both be ineffectual. It is therefore to be filed in Court by the official receiver (B. R. 217), and to be open to the inspection, at all reasonable times, of any person stating himself in writing to be a creditor of the bankrupt. As the statement is submitted within seven days of the receiving order, and is followed immediately by the public examination, and as the first meeting of creditors is to be summoned for a day not later than fourteen days after the date of the receiving order, creditors have a week to inform themselves of the debtor's financial position.

PUBLIC EXAMINATION OF DEBTORS.—The examination of a bankrupt in some form or another appears in every Bankruptcy Act, from the beginning; but the public examination, in its present shape, was introduced by the Bankruptcy Act of 1869. It has been elaborated by the Acts of 1883 and 1890. At it the debtor has to face his creditors, and submit to be closely questioned as to his conduct, dealings, and property. Any creditor who has proved, is entitled to question the debtor concerning his affairs and the causes of his failure, and this privilege of "heckling" a debtor seems now the sole gratification left to the vindictive creditor. The participation of creditors gives to the examination that spur of personal interest wanting to an examination by a public official. The course is for the official receiver to apply to the Court to fix a day and hour for the examination. He then notifies it to the debtor, and the order is also advertised in a local paper, and gazetted. If the debtor fails to attend, the Court may issue a warrant for his arrest. If the debtor fails to disclose his affairs, or has not complied with any order of the Court in relation to his accounts, conduct, dealings, and property, the Court may and ought to (*In re Denton*, 1873, 28 L. T. 175) adjourn the public examination *sine die* at the debtor's cost, and adjudicate him a bankrupt without any further notice. In old days the bankrupt would have lost an ear at the pillory. If the debtor is a lunatic, or suffers from any such mental or physical affliction or disability as in the opinion of the Court makes him unfit to attend his public examination, the Court may dispense with the examination, or impose terms as to the manner of taking, and the place. The debtor is examined on oath, and must answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper are to be taken down in writing, and read over

either to or by the debtor, and signed by him. They may, thereafter, be used in evidence against him—being in the nature of admissions. But such notes are not the only evidence. Parol evidence of the bankrupt's statements in the course of his public examination are also admissible (*R. v. Erdheim* [1896], 2 Q. B. D. 260). A creditor may be represented at the public examination by a solicitor, without authorising the solicitor in writing (*In re Landrock*, 1884, 1 Mor. Bky. 21).

FIRST MEETING OF CREDITORS.—The Court being then in possession, by its officer, the official receiver, of the debtor's assets, and the creditors apprised of the state of his affairs, the next step is to ascertain how the creditors desire those assets to be dealt with or administered; that is to say, in bankruptcy or under a scheme of arrangement; or again, by the official receiver, or a trustee of their own choosing. To determine these matters, the first thing to be done, therefore, is to call a meeting of creditors. Here, by the way, as elsewhere in the Act, we may note officialism waiting on the wishes of creditors. This first meeting of creditors is, under the Act, to be summoned for a day not later than fourteen days after the date of the receiving order, and it is the duty of the official receiver to summon it by giving not less than seven days' notice of the time and place of the meeting in the *London Gazette* and in a local paper (B. R. 250), and three days' notice to the debtor personally, or by letter (B. R. 249). The place of meeting is to be that which is most convenient for the majority of creditors (1st Sched. r. 4). The notice informs the creditor of this, and encloses forms of proof, and of general and special proxy, for use by the creditor. It also informs him when and where the public examination will be held, and encloses a summary of the debtor's statement of affairs (if lodged). It further notifies the creditor of the matters on which the creditors may, at the meeting, decide, namely, that they may—(1) By ordinary resolution resolve that the debtor be adjudged bankrupt, and appoint a trustee; (2) That they may by ordinary resolution fix the remuneration of the trustee, or leave it to the committee of inspection; (3) That they may by ordinary resolution appoint a committee of inspection from amongst the creditors, or the holders of general proxies, or general powers of attorney for the creditors. No person is entitled to vote as a creditor at the first, or indeed any other, meeting of creditors, unless he has duly proved a debt provable in bankruptcy to be due to him from the debtor, and the proof has been duly lodged before the time appointed for the meeting (1st Sched. r. 8). This time is between twelve o'clock on the day but one before the meeting, and twelve o'clock on the next day (B. R. 222). In case of an adjourned meeting, a proof too late for the first meeting must be lodged twenty-four hours before the adjourned meeting (B. R. 222, a). An unliquidated or contingent or unascertained debt will not qualify a creditor to vote (B. A., 1st Sched. r. 9). If a creditor cannot ascertain exactly the amount due to him—if, for instance, the debt is one due on an open account—the creditor's proper course is to pledge his oath that a certain sum "and upwards" is due to him, and not attempt to estimate what he thinks will probably be due (*In re Dummelow*, 1873, L. R. 8 Ch. 997; *Ex parte Simpson*, 1736, 1 Atk. 70). A secured creditor wishing to vote must surrender or value his security, and vote only in respect of the balance (1st Sched. r. 10); and, on the same principle, the holder of a bill of exchange or promissory note must, for the purpose of voting (not dividend), treat the liability of every person liable on the bill or note antecedently to the debtor as security, estimate the value of such security, and deduct it from his proof (1st Sched. r. 11). The bill or note must also itself be produced

to the official receiver, chairman of the meeting, or to the trustee (B. R. 221). A mortgagee must similarly produce his mortgage deed, but he need not produce his title-deeds (*In re Dunkley*, 1882, 45 L. T. 560). The object of these provisions is, of course, plain—to secure that the persons really interested in the estate—the just creditors—shall have the controlling voice in its administration. The chairman of the meetings is the official receiver, or some other person nominated by him (1st Sched. r. 7), and on him devolves the duty of admitting or rejecting a proof for the purpose of voting (1st Sched. r. 14). If in doubt, he should mark the proof as objected to, and allow the creditor to vote, subject to the vote being afterwards declared invalid. Creditors are permitted to vote either in person or by proxy (Sched. i. r. 15), and to facilitate their doing so it is that proxy forms are sent them with the notice of first meeting. Proxies under the Act of 1869 were one of the worst mischiefs of the then system. They had a market value, like parliamentary votes in the old days, and were freely canvassed for and bought by persons competing for the lucrative office of trustee. A proxy might even be worth more than a dividend. The present Acts have aimed at checking this abuse, by allowing the creditor to give a general proxy only to his manager, clerk, or other person in his regular employment (Sched. i. r. 17); and by providing that, if solicitation has been used by or on behalf of a trustee or receiver in obtaining proxies, or in procuring the trusteeship or receivership, the Court may disallow the wrong-doer all remuneration (1st Sched. r. 20). A creditor may give a general or special proxy to the official receiver of the debtor's estate (1st Sched. r. 21). Proxies, to secure *bona fides*, must be filled up in the handwriting of the person giving the proxy.

THE OFFICIAL RECEIVERS.—The network of official administration in bankruptcy is now spread over the whole of England. The centre of the system is the London Bankruptcy District, comprising the City of London and its liberties and the areas of the Metropolitan County Courts. The rest of the country is divided into districts coextensive with the County Court Districts, the districts which have no bankruptcy jurisdiction given them being attached to those which have. For each of these districts an official receiver is appointed. The official receivers of those districts—about eleven—where the business is most heavy, such as those of London, Birmingham, Manchester, Hull, etc., receive salaries ranging from £500 to £1200 a year. The rest, of whom there are about fifty, are paid by fees.

The official receiver, under the present system, occupies a twofold position—has a double *persona*. He is the officer of the Court, and it is in this capacity—acting as the hand of the Court—that he takes possession, on the making of a receiving order, of all the debtor's assets.

But the official receiver is also an officer of the Board of Trade, and as such accountable to it for funds received by him, and for the performance of his duties generally. These duties of the official receiver are twofold—they have relation (1) to the conduct of the debtor, and (2) to the administration of his estate. As regards the debtor, it is his (the official receiver's) duty to investigate the conduct of the debtor, and to report to the Court, stating whether there is reason to believe that the debtor has committed any act which constitutes a misdemeanour under the Debtors Act, 1869, or the Bankruptcy Act, or which would justify the Court in refusing, suspending, or qualifying an order for his discharge; to report also concerning the debtor's conduct, as the Board of Trade may direct; and to take part in the public examination of the debtor (B. A., s. 69).

(2) As regards the estate of the debtor, the duty of the official receiver

is to act as interim receiver of the debtor's estate pending the appointment of a trustee, and, where a special manager is not appointed, as manager thereof; to advertise the receiving order, the date of the creditors' first meeting and of the debtor's public examination; to preside at the first meeting of creditors, and to issue forms of proxy for use at the meetings of creditors; and to act as trustee during any vacancy in the office of trustee (B. A., s. 70).

The official receiver is, in a word, a provisional trustee; but his position is more that of receiver than trustee. He is not to incur any expense beyond such as is required for the protection of the debtor's property, or for disposing of perishable goods. If it is necessary to raise money to redeem property of the debtor, to prevent its being sacrificed by a sale, he should get the sanction of the Board of Trade or of the Court; not act on his own judgment.

As far as practicable, he is to consult the wishes of the creditors as to the management of the property, and may summon a meeting for that purpose.

The official receiver will be allowed out of the estate the costs of proceedings by him, even though such proceedings are misjudged, if he has acted *bonâ fide* (B. R., r. 339 (ii.); *In re Wells & Croft*, 1895, 2 Manson, 41). He must not, directly or indirectly, by himself, his clerk, or partner, act as solicitor in any proceeding in bankruptcy (*In re Taylor*, 1885, 2 Mor. Bky. 127).

THE ORDER OF ADJUDICATION.—The receiving order is designed merely to protect the assets until the creditors decide what is to be done. If they resolve at their first meeting that the debtor shall be adjudicated a bankrupt, or if they pass no resolution or do not meet, or if no composition or scheme is accepted and approved within fourteen days after the debtor's examination, the ordinary result follows, and the Court, the Act says, "shall adjudge" the debtor bankrupt. Thereupon the property of the bankrupt vests in a trustee for division among his creditors, and the order of adjudication is duly gazetted. The words "shall adjudge" do not, however, mean that the Court has not a discretion in the matter, or that the right of the petitioning creditor is one *ex debito iustitiæ* (*In re Pinfold* [1892], 1 Q. B. 73; *In re Thurlow* [1895], 1 Q. B. 724). The Court can still, as James, L. J., said in *In re McCulloch*, 1880 (14 Ch. D. 716, 723), refuse to make a man bankrupt if the petition is presented for an improper purpose, or if the Court is satisfied that no assets will be forthcoming. Adjudication consummates bankruptcy. Then, and not till then, the property of the bankrupt vests in the trustee, or the official receiver acting as such, and becomes divisible among his creditors (B. A., s. 20).

DISQUALIFICATIONS CREATED BY BANKRUPTCY.—The *diminutio capitis* which attended a *cessio bonorum* at Rome is reproduced in our law of disqualification. In our own country insolvent legislators were at one time a grave scandal. That is all changed now. A debtor who is adjudged bankrupt is by the law of bankruptcy disqualified from sitting or voting in the House of Lords (this is new as to a peer) or the House of Commons. He is also disqualified from being appointed a justice of the peace; from holding the office of mayor, alderman, or councillor; or being elected to or holding the office of guardian of the poor, overseer of the poor, member of a sanitary authority, member of a school board, highway board, burial board, select vestry, or county council. This disqualification clause is a sweeping one, but it is the necessary penalty of impecuniosity. The disqualification ceases on discharge, where the Court certifies that the bankruptcy was

caused by misfortune, without misconduct (see *In re Burgess*, 1887, 4 Mor. Bky. 186); and, in any case, only endures for five years from discharge (B. A., 1883, s. 32; B. A., 1890, s. 9). A bankrupt is not disqualified from exercising powers vested in him as tenant for life under the Settled Land Acts.

SPECIAL MANAGERS.—Mystic and wonderful as is the power of officialism, an official receiver cannot do everything. He cannot carry on all kinds of business, from banking to baking, and the Act, recognising this difficulty, has met it by empowering him, if satisfied that the nature of the debtor's business or the interest of his creditors requires the appointment of a special manager, to appoint one to act till a trustee is chosen (B. A., s. 12), and to authorise him—the special manager—to raise money and make advances for the purposes of the Act (B. A., s. 70 (b)). Such special manager is to give security, and to account to the Board of Trade. He is remunerated as creditors may determine, or, failing that, as may be prescribed by the Board of Trade. If the official receiver thinks the case is not one for a special manager, the Court will not interfere with his discretion (*In re Whitaker*, 1884, 1 Mor. Bky. 36). The number of special managers appointed in a year is about forty.

THE TRUSTEE IN BANKRUPTCY.—On the making of a receiving order, the official receiver becomes, as we have seen, receiver of the debtor's property (s. 9); and upon adjudication, he becomes, until a trustee is appointed, trustee of the estate, and the property of the bankrupt thereupon vests in him till a trustee is appointed, and he may, if necessary, sell it (*In re Parker*, 1885, 2 Mor. Bky. 12). Normally, we may say, the official receiver is intended by the Act to be trustee. He is trustee during any vacancy in the office of trustee; he is trustee in small bankruptcies (B. A., s. 121 (1)), and in the administration of the estates of deceased insolvents (B. A., s. 125 (5)); but in ordinary bankruptcies the official receiver is liable to be superseded by the nominee of the creditors. Thus, sec. 21 of the Act provides that the creditors may, by ordinary resolution,—that is, a resolution of a majority in value of the creditors present, personally or by proxy, at a meeting of creditors, and voting on the resolution (s. 168),—appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt, or they may resolve to leave his appointment to the committee of inspection. But, in either case, the choice of a trustee is subject to the sanction and control of the Board of Trade, and the Board of Trade may refuse to certify it if, in the Board's opinion, it has not been made in good faith by a majority in value of the creditors voting, or that the appointee is not a fit person to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally. This control of the Board of Trade over the appointment of a trustee is one of the cardinal points of the present system. It is aimed at the abuses which had arisen under the Act of 1869, when the trustee was a "bird of prey." If the Board objects to the appointment, it is, if a majority in value of the creditors so request, to notify the objection to the High Court, and thereupon the High Court may decide on its validity. The principles on which this control of the Board ought to be exercised were considered in *Re Lamb* ([1894], 2 Q. B. 805). There one Gregson had been unanimously chosen trustee of the estate of a bankrupt—Lamb. Lamb's only asset was two-thirds of a property known as the Maplin Lands estate. Gregson was already trustee of the estate of one Emmerson, who alleged that he had a beneficial interest in half Lamb's share of the Maplin

Lands estate. Gregson was a creditor of Emmerson's estate for £3000, and of Lamb's estate for £400. The Board of Trade objected to Gregson, on the ground that it was "difficult for him to act with impartiality." Vaughan Williams, J., overruled the objection, on the ground that it would be better for the creditors to have the same trustee to realise the particular asset; but the Court of Appeal held that this was not the test, nor whether the trustee would, in fact, act with impartiality, but whether it would, under the circumstances of each particular case, be difficult for the trustee, as a man of ordinary honesty, to act with impartiality. Gregson, for instance, had a pecuniary interest in the success of Emmerson's claim, and would therefore have to fight against himself; and they upheld the Board's objection (see also *In re Mardon* [1896], 1 Q. B. 140).

If the creditors or committee of inspection do not appoint a trustee within four weeks of adjudication, the Board of Trade is to appoint some fit person. This is usually the official receiver; but the power of the creditors or committee of inspection to appoint still remains (B. A., s. 21 (7)).

No defect or irregularity in the appointment of a trustee will invalidate any act done by him in good faith (B. A., s. 143 (2)).

With regard to the powers of a trustee in bankruptcy (which includes the official receiver, acting as trustee), the Act draws a distinction between what the trustee may do of his own judgment, and what he may only do with the sanction of the committee of inspection, or, if there is no committee of inspection, with the sanction of the Board of Trade. He may, for instance, of his own motion, sell all or any part of the business of the bankrupt, including goodwill and book-debts, may give receipts, prove in the bankruptcy of any debtor of the bankrupt, and exercise any powers vested in a trustee under the Act (B. A., s. 56); but he cannot carry on the business of the bankrupt for beneficially winding it up, or bring or defend actions, or employ a solicitor, or sell for a deferred consideration, or raise money on the estate by mortgage or pledge, or refer disputes to arbitration, or compromise claims, or divide the assets in specie, without the permission of the committee of inspection or the Board of Trade; and this permission is not to be a general one, but must be given for each particular thing. If the trustee carries on the business, he must keep a distinct trading account (B. R. 308). If any creditors dissent, he can only carry it on for the purpose of beneficial winding-up. In all that he does the trustee is to have regard to the wishes of the creditors; and if there is a conflict between the wishes of the committee of inspection and the wishes of the general body of creditors, as expressed in a resolution by them, the wishes of the general body of creditors are to prevail (B. A., s. 89). Any creditor, with the concurrence of one-sixth in value of the creditors, may get the trustee to call a meeting.

If a trustee in bankruptcy, or the official receiver acting as such, makes an application to the Court which is unsuccessful, he will be ordered to pay the costs personally, as if he were an ordinary litigant (*In re Augerstein*, 1874, L. R. 9 Ch. 479; *In re Granville*, 1885, 2 Mor. Bky. 71). If the estate is likely to be insufficient, the trustee should get an indemnity from the creditors against the costs.

The remuneration of the trustee is fixed by an ordinary resolution of the creditors (which must state what the remuneration is to cover), or, if the creditors so resolve, by the committee of inspection. It is to be in the nature of commission or percentage, one part payable on the amount realised (after deducting any sums paid to secured creditors out of their

security), and the other part on the amount distributed in dividend. A resolution, in appointing a solicitor trustee, that his remuneration shall be "his proper professional charges as a solicitor for attendances and work done," is invalid (*In re Wayman*, 1890, 24 Q. B. D. 68). But where a solicitor is appointed trustee, he may contract that the remuneration for his services as trustee shall include all professional services (s. 73 (2)). In either case, whether the creditors or the committee of inspection have fixed the remuneration of the trustee, the Board of Trade has a controlling power, on the application of dissentient creditors, or of the bankrupt himself, to fix the amount (*In re Gallard*, 1891, 9 Mor. Bky. 52); but the Court has laid down in *Re Shirley*, 1891, 9 Mor. Bky. 147, 154, that this overruling power is to be exercised with great care. A trustee, it need hardly be said, must not, under any circumstances, accept any gift or remuneration from the bankrupt, or from any solicitor, auctioneer, or other person employed about the bankruptcy (B. A., s. 72 (5)). Impartiality—the strictest—is the essence of his office.

THE COMMITTEE OF INSPECTION.—The control of the Board of Trade over the appointment of a trustee is one mode of securing purity and efficiency of administration in bankruptcy introduced by the Act of 1883, but it is not the only one. The trustee is meant not only to be well chosen, but to be closely watched and supervised. The machinery for this latter purpose is a committee of inspection composed of creditors,—a working committee, not more than five or less than three in number (s. 22 (1)). The committee is to meet at least once a month—oftener if it so appoints. Also the trustee, or any member of the committee, may call a meeting when he thinks necessary. Absence by a member for five consecutive meetings vacates his office. The committee may act by a majority present at any meeting, but not unless a majority of the committee is present. Vacancies are to be filled up. The functions of the committee of inspection are to examine the trustee's record-book and audit his cash-book not less than once every three months, and also to give their sanction, if desirable, to the trustee carrying on the bankrupt's business, bringing actions, employing a solicitor, mortgaging, compromising with creditors, etc. (B. A., s. 57). It is a cardinal principle that a member of the committee of inspection must make no profit from any transaction arising out of the bankruptcy (*In re Gallard* [1896], 1 Q. B. 68).

PROPERTY OF THE BANKRUPT.—The end of all bankruptcy administration—as has been already said—is the equitable distribution of the bankrupt's assets among his just creditors, and by assets is meant all the property which ought to go to satisfy the bankrupt's creditors. It is to this end—to secure that the bankrupt's entire estate shall be available for his creditors—that all the distinctive doctrines of bankruptcy law are directed: the doctrine of reputed ownership and the doctrine of the relation back up the trustee's title, the avoidance of executions, the annulling of fraudulent and voluntary settlements, and the defeating of fraudulent preferences, all have one and the same object. The same policy appears in the definition of the property of a bankrupt divisible among his creditors. The bankruptcy net is made very wide. It sweeps in "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired or devolve on him before his discharge" (B. A., s. 44). The only property excepted is property held by the bankrupt in trust, and tools, bedding, and wearing apparel for himself and his family to the value of £20. The word "property," too, has, by the interpretation clause, the largest signification. It includes "money,

goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined."

As to personal property or moveables, the well-known rule is *mobilia sequuntur personam*, and therefore moveables of a bankrupt domiciled in England, wherever such moveables are situate, vest in the trustee, but real estate is subject to the *lex loci rei sitæ*, and therefore, if the bankrupt is entitled to immoveable property in a foreign country, such real estate will not vest in the trustee (see Dicey, *Conflict of Laws*, 443 *et seq.*); but the bankrupt may be ordered to execute a conveyance of such land on the motion of the trustee, and if he neglects to do so he may be committed (*In re G. W. Harris*, 1896, 3 Manson, 46). If a debtor has, before his bankruptcy, contracted to buy or sell lands, his interest, whatever it is, passes to his trustee, subject to all equities (*In re Scheibler, Ex parte Holt-hausen*, L. R. 9 Ch. 722-726); but the trustee is at liberty to disclaim, if the contract is an unprofitable one.

As to the powers of a bankrupt, the trustee may exercise all powers in respect of property which the bankrupt might have exercised for his own benefit, except nomination to an ecclesiastical benefice (B. A., s. 44 (2) (ii.)). But some powers are personal to the bankrupt, and are not, like his property, divested by bankruptcy (*Smith v. Wheeler*, 23 Car. II., Vent. 128).

Damages recovered by an undischarged bankrupt in an action for a personal tort do not pass to his trustee (*In re Wilson*, 1878, 8 Ch. D. 364).

If the bankrupt is a beneficed clergyman, the trustee may obtain a sequestration of the profits of the benefice (B. A., s. 52); and he—the trustee—is entitled to go on receiving such profits, though the clergyman has obtained his discharge, until all the debts proved have been paid in full (*In re Chick*, 1879, 11 Ch. D. 731; *Lawrence v. Adams*, 1896, W. N. 158). In the case of officers of the army or navy who become bankrupt, or of civil servants, the Court may, with the consent of the chief officer of the department, order so much of the salary as it thinks fit to be distributed among creditors. Similarly, in the case of officers in receipt of a pension or half-pay, the Court may order part of the half-pay or pension to be applied for the benefit of the creditors (B. A., s. 53). In exercising its discretion under this section, the Court regards the policy of the State, that valour should not go in rags or an ex-judge ply a broom. The Court has the same jurisdiction where a bankrupt is in the enjoyment of any other "salary or income": if he is an actor, for instance, under an engagement (*In re Shine* [1892], 1 Q. B. 522), or a commercial traveller (*In re Brindley*, 1887, 4 Mor. Bky. 104), or an editor of a newspaper (*Wadling v. Oliphant* [1896], 1 Q. B. 145), or a chaplain to a workhouse (*In re Mirams*, 1891, 8 Mor. Bky. 59). A purely voluntary allowance made to a debtor is not "salary or income" (*Ex parte Wicks*, 1881, 17 Ch. D. 70).

AFTER-ACQUIRED PROPERTY.—The words of the property section of the Bankruptcy Act (s. 44) include not only all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, but all property which may be acquired by or devolve on him between the commencement of the bankruptcy and the date of discharge. The Courts have, however, laid down the principle—qualifying the strict words of the Statute—that, until the trustee intervenes, all transactions by a bankrupt after his bankruptcy, with any person dealing with him *bona fide* and for value, in respect of his after-acquired property, whether with or

without knowledge of the bankruptcy, are valid against the trustee (*Cohen v. Mitchell* [1891], 25 Q. B. D. 262), and it makes no difference whether the trustee knows of the dealing or not; but the principle laid down in *Cohen v. Mitchell* is meant only for the protection of persons dealing with the bankrupt in ordinary course, and as ostensible owner. It does not give a superior title to creditors in a second bankruptcy over creditors in a first, unless there has been some laches or acquiescence by the trustee in the first bankruptcy,—some conduct which entitles the subsequent creditors to say, "You must not set up your right against us" (*Pickard v. Sears*, 1838, 6 Ad. & E. 469; *Wadling v. Oliphant*, 1876, 1 Q. B. D. 145, 147). The principle of *Cohen v. Mitchell* applies to chattel interests in land (*In re Clayton & Beaumont's Contract* [1895], 2 Ch. 212), but not to real estate (*In re New Land Development Association* [1892], 2 Ch. 138). *In re Vanlohe*, 1872, L. R. 7 Ch. 185, is a good illustration of the rule. There an undischarged bankrupt took a house for six months at £5 a week, payable in advance, and paid the £130 out of a sum of £200 received by him as compensation for being turned out of an appointment which he had got since the bankruptcy, and the Court held that, though the trustee might have intercepted the £200, he could not follow it into the hands of the landlord.

There is another qualification of the general principle, that until a bankrupt has obtained his discharge all his property is divisible among his creditors; and that is in regard to personal earnings. An exception, as James, L. J., said, was absolutely necessary in order that the bankrupt might not be an outlaw, a mere slave to his trustee—he could not be prevented from earning his own living; on that principle the trustee could not sue for moneys due to the bankrupt in respect of his personal labour and skill. Thus the earnings of a bankrupt who had a special gift of bone-setting were held not claimable by the trustee (*In re Hutton*, 1884, 14 Q. B. D. 301), and the same applies to a singer; but earnings by a bankrupt in his business are not the less property because the business is one which involves a large amount of skill and attention by the bankrupt, like that of a dentist (*In re Rogers* [1894], 1 Q. B. 425), a surgeon-apothecary (*Elliott v. Clayton*, 1854, 16 Q. B. 584), or an architect (*Emden v. Carter*, 1881, 17 Ch. D. 768). And this principle of the exemption of personal earnings must not be abused. Vaughan Williams, J., has lately held that they are only protected to the extent of what is required for the maintenance of the bankrupt and his family (*In re Graydon* [1896], 1 Q. B. 417).

DISCOVERY OF DEBTOR'S PROPERTY.—When a receiving order has been made against a debtor, one of the first difficulties with which the official receiver or the trustee is confronted, is to ascertain what the property of the debtor consists of and where it is. A debtor's statement of affairs is generally inflated and often unreliable. Unscrupulous debtors on the eve of insolvency have many means of withdrawing their property from their creditors, by a secret trust or colourable transfer. In the case of debts, the policy of the unjust steward receives constant illustration in bankruptcy. From the earliest times bankruptcy law and the energies of those who have administered it, have been directed to secure a full disclosure of his property by the bankrupt. So vital a matter was this felt to be, that, under 5 Geo. II. c. 30, death was the penalty awarded to a bankrupt not surrendering, or embezzling, his estate to the amount of £20,—a penalty subsequently commuted by 1 Geo. IV. c. 115, to transportation for life or seven years' imprisonment. The Bankruptcy Act, 1869, introduced, and the present Act has adopted, a machinery for defeating the arts of

fraudulent debtors, and compelling as complete discovery as possible of the whole of the debtor's estate. To this end it authorises the Court (s. 2) to summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and to require any such person to produce any documents in his power or custody relating to the debtor, his dealings or property. This may seem a very inquisitorial power; but it is to be remembered that the debtor is coming to crave the aid of the Court to release him from the burden of his indebtedness, petitioning for what is a great privilege, and the first condition of granting him such is *uberrima fides* on the debtor's part in every respect, and, as to his property in particular, full disclosure and surrender. First principles of moral obligation of this kind are, however, of course ineffectual with dishonest debtors, and the law is therefore compelled to resort to a machinery for extorting discovery, like that contained in sec. 27.

As to who may apply for discovery, the Act says, "on the application of the official receiver or trustee"; and where the official receiver or trustee is willing to do so, he is no doubt the proper person, just as in the winding-up of companies the liquidator is *prima facie* the proper person to examine as to assets, etc., under sec. 115, because in theory the examination is by the Court; but the trustee may not be willing to do so, for reasons which are either *bona fide* or *mala fide*; then a creditor (*In re Russell*, 1872, 26 L. T. 226) may apply, but at his own risk as to costs, unless the Court gives him them. The trustee, at all events, cannot oppose the application. It may be, too, that the trustee himself is wanted to give discovery. It is not intended—so much is plain on the authorities—that a creditor should use the powers of this section for his private benefit (*In re Easton*, 1891, 8 Mor. Bky. 168). He is bound to show that some benefit will result to the estate or to creditors (*In re Wilson*, 1880, 14 Ch. D. 243).

The debtor is not entitled to attend the examination (*In re Beall* [1894], 2 Q. B. 135); but notes of the examination are taken, and must be filed so that the debtor has access to them, if he wants to know their contents, in applying for his discharge. A person summoned under the section must have his travelling expenses paid, otherwise he cannot be committed if he fails to attend, but this does not include allowance for loss of time (*Re Batson, Ex parte Hastie*, 1894, 1 Manson, 45), or costs of employing solicitor or counsel (*In re Lutscher*, 1877, 6 Ch. D. 328). The power of examination must not be used for a collateral purpose. This has not unfrequently been attempted by a contributory under the analogous section—s. 115 of the Companies Act—in winding-up, to get information in an action which he is bringing. But it is an abuse, and for this reason that the statutory examination in both bankruptcy and winding-up is of a much more searching and inquisitorial character than the ordinary discovery permitted in an action.

Besides giving discovery of his property, the bankrupt is bound to assist the trustee to the best of his ability in the realisation of his property. The question arose in *Re Betts & Block* (1887, 19 Q. B. D. 39; affirmed 13 App. Cas. 576), whether under this section the bankrupt was bound to submit himself to medical examination for the purpose of enabling the trustee to realise the bankrupt's life interest to greater advantage. The Court held that the bankrupt was not bound.

EXECUTIONS, ATTACHMENT OF DEBTS, ETC.—A person becoming bankrupt gives rise, as we might naturally expect, to many competing

claims between the general body of his creditors and particular creditors or purchasers. For instance, an execution creditor seizes goods pending a petition on which the execution creditor is made a bankrupt: To which ought the goods seized to belong? or he attaches a debt owing to his debtor: To whom ought the debt to be paid? These are nice questions of legal casuistry. In the Bankruptcy Act, 1883, s. 45, the Legislature has laid down certain *criteria* for the determination of such questions, embodying and harmonising the result of numerous decisions. The substance of this section is that a creditor who has levied execution or attached debts is not entitled to retain the benefit of his execution or attachment unless he has completed it before the date of the receiving order, and without notice of a bankruptcy petition, or any available act of bankruptcy. Completion, in the case of an execution against goods, means seizure and sale; in case of attachment of debts, receipt of the debt; and in case of execution against land, seizure; or, where the interest is equitable, by the appointment of a receiver. These provisions are fair and reasonable. The policy of the bankruptcy law is to secure equality while respecting rights already acquired by superior diligence. A sale by the Sheriff, though by private contract, gives the execution creditor a good title (*Crawshaw v. Harrison* [1894], 1 Q. B. 79).

AVOIDANCE OF VOLUNTARY SETTLEMENTS.—One of the principal ends of bankruptcy law is to prevent an insolvent debtor putting his property beyond the reach of his creditors by means of a voluntary or fraudulent settlement. The well-known Statute of Elizabeth (13 Eliz. c. 5) is an early, though by no means the earliest, attempt of the Legislature to cope with these devices of debtors. That statute declared utterly void all feoffments, gifts, grants, alienations, conveyances, etc., of land, tenements, hereditaments, goods, or chattels, covinously made to delay, hinder, or defraud creditors, but this avoidance was not to extend to any feoffment, gift, etc., on good consideration and *bona fide* conveyed to any person not having notice of the covin. Well-intentioned and beneficial as this time-honoured statute has been, and is, it was found insufficient to meet the exigencies of the situation, where bankruptcy was concerned; because, however fraudulent the settlor's intent, the conveyance is valid if the purchaser is free from fraud. The whole of a debtor's property may be assigned for a past debt without the transaction being impeachable under the statute. To supplement such deficiencies, ss. 47, 48 have been inserted in the present Bankruptcy Act. The short result of sec. 47 is that, if a person makes a voluntary post-nuptial settlement of his property, and becomes bankrupt within two years of doing so, the settlement is void against his creditors; and if the settlor becomes bankrupt within even ten years of the settlement, he must be prepared to show that he was solvent when he made it, without the aid of the property comprised in the settlement. This avoidance does not, however, apply to a settlement made before, and in consideration of, marriage, or in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or to a settlement made on the wife and children of the settlor, of property which has accrued to the settlor after marriage in right of his wife. But even marriage—the highest kind of consideration, as it has been called—will fail to support a settlement, if the celebration of the marriage is only part of a concerted scheme to protect the settled property against the rights of creditors of the settlor, as where a man married a woman with whom he had been cohabiting seven years, for the purpose, as she knew, of defeating creditors (*Columbine v. Penhall*, 1852, 1 Sm. & G. 228). So, again, the settlement, if in favour of a purchaser or incumbrancer, must be made, not

only for valuable consideration, but in good faith. In a recent case (*In re Tolley*, 1895, 3 Manson, 226), the friends of a young married spendthrift, who was coming in to £12,000 at twenty-one, were anxious that he should make a settlement of it. They were advised that to render such settlement valid against future creditors in bankruptcy there must be value given; so the mother covenanted to pay the spendthrift settlor £50 a year more, and a brother covenanted to pay him £25. It was argued that this consideration was a manufactured one, given to bolster up the deed, but the Court upheld the deed, and the Court of Appeal affirmed the decision. The mere fact that a settlement places property beyond the reach of future creditors, does not make it fraudulent against them, for the protection of the settled property is the very object—and a legitimate object—of every settlement. It often happens that a man, on marriage, settles his own property, reserving to himself a beneficial interest—usually a life interest—and this life interest is made defeasible on bankruptcy. In such a case the defeasance is void against the trustee, and it makes no difference that there has been valuable consideration (*Whitmore v. Mason*, 1861, 2 J. & H. 204), for an owner of property cannot put a life interest which belongs to him, any more than any other property, out of the reach of his creditors. But the rule does not prevent the settlement of a wife's property on her marriage, so as to give her husband a life interest, determinable on his bankruptcy (*Montefiore v. Behrens*, 1865, L. R. 1 Eq. 171; *Mackintosh v. Pogose* [1895], 1 Ch. 505); and for this reason, that the wife, in such a case, has bargained for the gift over to herself or the trustees, on her husband's bankruptcy, and the Court cannot deprive her of the benefit of her bargain.

When the Court sets aside a settlement, under s. 47 of the Act, it does not wipe out the settlement. The avoidance of the settlement—so Vaughan Williams, J., has recently decided—has no operation further than is necessary for payment of the bankrupt's debts and the cost of the bankruptcy. The rights of the beneficiaries remain good against the settlor (*In re Sims*, unreported).

FRAUDULENT PREFERENCE.—At common law there is nothing to prevent a debtor preferring one creditor to another, and the Statute of Elizabeth (13 Eliz. c. 5) leaves this common-law privilege unaffected. It is obviously, however, opposed to the fundamental principle of bankruptcy law—the equitable distribution of assets among all entitled to share. As soon as it becomes plain to an insolvent debtor that there must be a judicial administration of his estate, in due course of law, it is dishonesty on his part to do anything to put one creditor in a better position than another. This principle, which founds the law as to fraudulent preference, was first formulated in sec. 92 of the Bankruptcy Act, 1869, and is now reproduced, with some slight variations, in sec. 48 of the present Act, 1883. The period during which any payment, transfer, etc., by way of fraudulent preference, is made impeachable, is three months before presentation of a petition on which the debtor is adjudicated a bankrupt.

The elements which go to make up a fraudulent preference are two—First, insolvency—inability, that is to say, on the debtor's part to pay his debts as they become due, from his own moneys; and, secondly, a view of giving the creditor in question a preference over the other creditors. It was at one time held that a view meant the sole view, but it is now settled that the statutory definition (which says "a" not "the") must not be adulterated by earlier decisions, and that it is sufficient if the debtor's view in preferring is the "substantial, effectual, or dominant view" (*In re Bird*, 1883, 23 Ch. D. 695). It is none the less so that there is an ulterior motive

on the debtor's part as well, *e.g.* to get the preferred creditor's patronage in the future. Preferring is, as the word implies, a voluntary act; and it was formerly held as a corollary from that, that if there was pressure by the creditor the payment was not the voluntary act of the debtor. But pressure will not now be held to necessarily negative a view on the debtor's part to prefer, because to a man on the verge of bankruptcy, pressure is indifferent (*In re Cooper*, 1882, 19 Ch. D. 580). The person interested in upholding the payment must go further, and show that the avoidance of that pressure was the dominant motive of the debtor in making the payment (*In re Bell*, 1893, 10 Mor. 15). A payment made by an insolvent debtor, in pursuance of an antecedent agreement for value, is not a fraudulent preference.

RELATION BACK OF THE TRUSTEE'S TITLE.—When once a debtor's insolvency is established, and it is clear that his estate must be distributed among his creditors, it is desirable that the earliest date at which the insolvency disclosed itself should be adopted as the date for distribution. This is the principle that underlies the doctrine of the relation back of the trustee's title—a doctrine which has been recognised, with trifling variations, by all the Bankruptcy Acts, from 13 Eliz. c. 7 till to-day. Some limit must, however, be fixed to the doctrine; otherwise it would be too indefinite and unpractical. The Act of 1869 fixed it at the first act of bankruptcy, within six months of the petition; the present Act at the first act of bankruptcy, within three months (B. A., s. 43). The result of this is greatly to the benefit of creditors, inasmuch as it avoids a number of dispositions of property which a debtor is tempted to make when he finds himself on the brink of the gulf of commercial insolvency. One of the leading cases on the subject is *In re Pollitt* ([1893], 1 Q. B. 455).

In that case a debtor asked a solicitor, to whom he already owed £40 for costs, to prepare for him a deed of assignment for the benefit of his creditors. The solicitor said: "I cannot work any more for you on credit. I must be paid beforehand; you must give me a sum sufficient to cover the costs of any work which I may undertake for you." The debtor, accordingly, gave the solicitor £15, and he prepared a deed of assignment at a cost of £2, 17s. 8d., and the deed was executed by the debtor. The execution of such a deed constituted, as the solicitor knew, an act of bankruptcy by the debtor, and the debtor was in fact afterwards adjudicated a bankrupt in respect of it, and the title of the trustee related back to it. "What does that mean?" Says Lord Esher: "The result of the relation back is that all subsequent dealings with the debtor's property must be treated as if bankruptcy had taken place at the moment when the act of bankruptcy was committed. The debtor must be considered as having become a bankrupt the moment the deed was executed. Then, he being a bankrupt, all the money which he then had, and all the money which was owing to him, passed to the trustee in the bankruptcy, for the purpose of being distributed by him amongst the bankrupt's creditors. At that very moment the solicitor could not do any work for the bankrupt, so as to take away from the trustee the money which was then due to the bankrupt, for the act of bankruptcy put an end to the solicitor's authority to do work for the bankrupt, as against the money which he then had in hand." *In re Spackman, ex parte Foley* (1890, 24 Q. B. D. 728), is another similar illustration of the working of the principle. There is, however, in such cases one exception. Money paid by a debtor to his solicitor, to defray counsel's fees, and other legal expenses, in opposing proceedings in bankruptcy, that have been commenced against the debtor, cannot be

recovered from the solicitor by the trustee in the debtor's subsequent bankruptcy, though at the time of receiving the money the solicitor knew of the act of bankruptcy (*In re Sinclair, ex parte Payne*, 1884, 15 Q. B. D. 616). This exception is grounded on humanity. If such payment had to be refunded, a debtor would be left defenceless, because nobody would act for him.

The doctrine of relation back does not affect the Crown (*In re Bonham*, 1878, 10 Ch. D. 595; B. A., s. 150).

REPUTED OWNERSHIP.—What is known as the reputed-ownership doctrine is perhaps the strongest example of the aid which the law of bankruptcy gives to creditors. That law is not satisfied with seizing the debtor's own property to pay his debts. It seizes also property of which he is not the real, but only the reputed, owner. This doctrine is as old as the reign of James I., and is now embodied in sec. 44 (2) iii. of the Bankruptcy Act, 1883. The subsection makes divisible, as "property," among the bankrupt's creditors, "all goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt in his trade or business (that is to say, for the purposes of, and as connected with, his trade or business, *Colonial Bank v. Whinney*, 1885, 30 Ch. D. 261), by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof;" so that, to put it plainly, the law takes A's goods to pay B., C., and D., who are no creditors of his, but of X's. The equity of the creditors is based on estoppel. As James, L. J., said in *Ex parte Wingfield* (1878, 10 Ch. D. 591, 594): "If goods are in a man's possession, order, or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods, who has permitted him to obtain that false credit, is to suffer the penalty of losing his goods for the benefit of those who have given the credit." It is not necessary that the reputed owner should have actually obtained credit upon the goods. It is enough that credit might have been obtained (*per* Lord Blackburn, *Colonial Bank v. Whinney*, 1886, 11 App. Cas. 426, 436). The reputed-ownership doctrine applies to separate goods of a partner in the possession of his firm, with his consent (*In re Pulsford*, 1879, 8 Ch. D. 11), but not as between a dormant and ostensible partner.

Things in action, other than debts due, or growing due, to the bankrupt in the course of his trade or business, are excepted; and in the *Colonial Bank v. Whinney, supra*, the House of Lords decided that the expression "things in action" is not to be read in a narrow technical sense, but comprehends, for example, shares in a railway company. Shares and patents and copyrights, and policies of insurance and debentures, and such personal property of an incorporeal nature, are not visible and tangible, so as to give an appearance of false credit. Trade debts are different. They are known to exist, they are entered in the books of the trader, and persons dealing with him give him credit on the faith of them. Thus, where B. bought A's business as a wine merchant, and A., not being paid, got a receiver appointed of the book debts, and then B. became bankrupt, the debts were held to be in B's order and disposition as reputed owner, except as to a part, being debts of which A. had given notice to the debtor of his title (*In re Tillett*, 1889, 6 Mor. Bky. 70). Consent by the true owner is essential. Whether there has been such a consent, is a question of fact on the circumstances of each case (*Hamilton v. Bell*, 1855, 10 Ex. Rep. 545). There can, of course, be no consent without knowledge (*In re Caughey*, 1875, 1 Ch. D. 521, 528). The bankrupt, for the clause to apply, must be in sole possession of the goods as reputed owner.

The reputation of ownership is a presumption arising from possession, and, like other presumptions, may be rebutted by proof of a trade custom displacing the inference. There is a custom, for instance, for hop merchants to retain hops purchased by their customers (*In re Taylor*, 1885, 2 Mor. Bky. 268). Every one is supposed to know the custom, and no one, therefore, ought to give the hop merchant credit on the faith of his possession. This is the theory of law. The custom in the printing trade of hiring machinery (*In re Thackrah*, 1888, 5 Mor. Bky. 235), among hotel-keepers of hiring furniture (*Crawcour v. Salter*, 1881, 18 Ch. D. 30), and the agistment of cattle by farmers (*In re Woodward*, 1886, 3 Mor. Bky. 75), are other instances.

TRUST PROPERTY.—Property held by a bankrupt upon trust is not property divisible among his creditors. It would be highly inequitable if it were. For even if the bankrupt is the ostensible owner, the system of trusts is so notorious as to exclude any reputation of ownership. Be this as it may, the Legislature has expressly excepted trust property; and not only does not the beneficial interest pass to the trustee in bankruptcy, but not even the legal title, and this is the same with property vested in a bankrupt, *virtute officii*, as executor, administrator, or trustee in bankruptcy (*Ex parte Ellis*, 1736, 1 Atk. 101). A factor is a trustee in respect of property entrusted to him for sale, and such property or what represents it will not, therefore, on his bankruptcy, pass to his trustee, but belongs to his principal (*Copeman v. Gallant*, 1716, 1 P. Wms. 314). So far the general principle is clear, but in speaking of trust property it is necessary to remember that it cannot always be identified—distinguished from the rest of the mass of a bankrupt's estate. When this is the case, the trust property is absorbed and belongs to the bankrupt's creditors, but so long as a Court of equity can trace the trust-fund, through however many transformations, it follows it and treats it as ear-marked. It used to be said that money has no ear-mark, and this is true so far as the actual coins are concerned, but equity meets the difficulty in this way. If a trustee mixes trust-moneys with his own moneys at his banker's, and draws upon the mixed fund, the law presumes that he means to deal with his own moneys in the first instance, to be honest and not dishonest, and therefore any residue belongs to the trust. So, if a trustee lends £1000 of his own money and £1000 of trust-money on mortgage, equity gives the *cestui-que trust* a charge for £1000.

When goods and chattels are in possession of a man for a specific purpose, this is a species of trust. Bills and notes may, for instance, be appropriated, and if they have been and remain in specie in the bankrupt's hands, at the date of his bankruptcy, the owner will be entitled to have them restored to him, or to the proceeds, if sold. The general right to have "short" bills in the hands of a bankrupt returned was established upon great consideration (*Ex parte Hall*, 1816, 19 Ves. 25).

DISCLAIMER OF ONEROUS PROPERTY.—When the trustee of a bankrupt enters into possession of the bankrupt's property, he often finds himself confronted with a serious difficulty. Part of the property consists of leaseholds burdened with onerous covenants, or of not fully paid shares or stock, or perhaps of unprofitable contracts—property, in fact, which is unsaleable or not readily saleable. What is he to do? If he keeps the white elephant he must set apart a large portion of the estate to provide maintenance for it, thereby wasting the estate or indefinitely postponing its distribution. The Legislature has recognised this dilemma, and has given relief by according to the trustee a power of disclaimer. The theory of this power of disclaimer is to eliminate the bankrupt, his rights, interests, and liabilities altogether,

in respect of the disclaimed property, together with any personal liability of the trustee, and to substitute therefor a right, by any person injured by the disclaimer, to prove as a creditor in the bankruptcy, to the extent of the injury. No rights or liabilities of any person, other than the bankrupt, are to be affected by the disclaimer. The trustee has ample time—twelve months after his appointment or the property coming to his knowledge—to disclaim, and he does not waive his right by taking possession of the property and endeavouring to sell. His action may, however, be accelerated; that is to say, any person interested in the disclaimable property may call upon the trustee to decide whether he will disclaim or not, and if the trustee neglects to elect in twenty-eight days he disentitles himself to disclaim, and adopts the contract. The Court may also make an order for restoring of the property, or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation. The rights of the parties can, in any such cases of disclaimer, be easily worked out, but leases are peculiar. They involve very tangled rights, interests, and liabilities; and for this reason the trustee is not permitted to disclaim without the leave of the Court, except in special cases mentioned in Rule 320 of the Bankruptcy Rules. The Court can then impose equitable terms as to fixtures, tenant's improvements, and other matters arising out of the tenancy. The exceptions—where leave is not wanted—are where the bankrupt has not sublet the demised premises, or created a mortgage or charge on the lease. A mortgagee or under-tenant can, as a rule, only get a vesting order, under s. 55 (6) of the Bankruptcy Act, 1883, subject to the same liabilities and obligations as the bankrupt was subject to (*In re Walker*, 1895, 2 Manson, 319).

A disclaimer must be in writing. It must also be filed, and, until it is, is inoperative (B. R. 320 (4)).

ACTIONS—BANKRUPTCY OF PLAINTIFF.—When a person who is sole plaintiff in an action becomes bankrupt, and the action does not abate, but the bankrupt is not entitled to continue it, his interest in the cause of action having vested in his trustee in bankruptcy, as a rule that is because these are cases where the cause of action is personal to the bankrupt, and the bankrupt can in these cases go on with the action, and cannot be required to find security for costs. Where the cause of action vests in the trustee, he must elect whether he will prosecute the action or not. If he adopts it, he adopts the burden with the benefit, and becomes personally liable for the costs. The proper course for a trustee who wishes to proceed with an action, is to get an indemnity from the creditors.

BOARD OF TRADE CONTROL.—In the present system of official administration the Board of Trade plays the leading rôle. It animates and controls the whole, as it is well fitted to do. It issues administrative orders and settles forms of proceedings. It appoints and removes the official receivers (B. A., s. 66). It calls for and audits their accounts. It can require County Court costs to be taxed in the High Court. Where there is no committee of inspection, the Board takes its place (B. A., s. 22 (9)). It checks the receipts and expenditure of trustees of private deeds of arrangement (B. A., 1890, s. 25). It is the custodian of all moneys received by trustees and paid into the Bankruptcy Estates Account at the Bank of England, and all payments out are by cheques of the Board. But it is particularly concerned with the supervision of trustees. It has to be satisfied, in the first place, of the fitness of a trustee to be appointed. In many cases it appoints him. It calls upon him to account. It takes cognisance of his conduct. If any trustee does not faithfully perform his

duties, or if complaint is made by any creditor in regard thereto, the Board is to inquire into the matter and take what action it thinks expedient. This means that it may disallow the trustee his remuneration (*In re Lister*, 1876, 2 Ch. D. 749). The Board may also at any time require any trustee to answer any inquiry as to the bankruptcy, and may examine on oath the trustee or any other person. The Board may also direct a local investigation to be made of the books and vouchers of the trustee (B. A., s. 91). Furthermore, the bankrupt, or any of the creditors or any other person "aggrieved by any act or decision of the trustee," may appeal to the Court. Thus, what with the jealous scrutiny of creditors, ranging at large or focused, and the committee of inspection on the one side, and the strict official supervision of the Board of Trade on the other, it demands genius of no common order on the part of a trustee to perpetrate any irregularity. The old days of happy irresponsibility for trustees have gone.

REMOVAL OF TRUSTEE.—The trustee may also be removed by the Board of Trade, if guilty of misconduct or failure in his duties, or if, by reason of lunacy or sickness, he cannot perform his duties, or if his connection with the bankrupt or his estate or any creditor make it difficult for him to act with impartiality in the interest of the creditors generally, or where in any other matter he has been removed from office on the ground of misconduct (B. A., 1890, s. 19). An appeal from the Board is allowed if the creditors disagree with its decision. The misconduct need not be fraud or dishonesty; vexatiously obstructing the realisation of the estate in the debtor's interest is misconduct (*In re Mansel*, 1885, 14 Q. B. D. 177; and see *In re Dunkeld*, 1883, 45 L. T. 569). The creditors may also remove a trustee by resolution at a special meeting (B. A., s. 86 (1)).

PARTNERS.—Corporations and companies registered under the Companies Act, 1862, are excepted from bankruptcy proceedings (B. A., s. 123), but ordinary partnerships, unincorporated, may be proceeded against in bankruptcy in the firm name (B. A., s. 115). A receiving order made against a firm is, however, to operate as if it were a receiving order made against each of the persons who, at the date of the order, is a partner in that firm (B. R. 262). If one of the partners is an infant, the receiving order may be made against the firm, other than the infant (*Lovell v. Beauchamp* [1894], App. Cas. 607). For the purpose of ascertaining this—the members constituting the firm—the Court may order disclosure to be made on oath (B. A., s. 115). So, on adjudication, the order of adjudication is not to be made against the firm in the firm name, but against the partners individually; in the case of a receiving order against a firm, the statement of the partnership affairs is to be made by the debtor partners jointly, while each debtor is to submit a statement of his separate affairs (B. R. 263). The object of this provision is to facilitate the administration of the joint and separate estate. More than a hundred years ago, Lord Loughborough, L. C., formulated the well-known rule—initiated by Lord King—that the joint estate of partners should be applied in the first instance to the payment of joint debts—the debts of the partnership—and the separate estate of each partner in the first instance to the payment of his separate creditors. If there is any overplus of the joint estate, then the share of each bankrupt in such overplus is to be applied in aid of his separate estate, in payment of his separate creditors; and, conversely, any overplus of separate estate is to be applied in payment of unsatisfied joint creditors. In Lord Cranworth's words: "The joint property pays the joint creditors, and the separate property pays the separate creditors." This is a well-settled and just rule, because, speaking generally, the creditors of the

partnership have given credit to the partnership assets, the separate or private creditors of each partner to his separate assets. The rule is, however, subject to exceptions, and one is where there is no joint estate at all (*Ex parte Peake*, 1813, 2 Rose, 54; *Ex parte Pinkerton*, 1801, 6 Ves. 814; 9 R. R. 326 n). Whether property is joint or separate estate is a question of fact, and it is immaterial what the creditor knew or thought about it (*In re Collie*, 1877, 3 Ch. D. 481).

Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against a firm, may present a petition against any one of the partners (B. R. 110).

PROTECTED TRANSACTIONS.—While bankruptcy law strikes at anything like fraudulent preference, or voluntary settlement for defeating or delaying creditors, the Act is careful to protect *bond fide* transactions. Nothing is to invalidate, in case of a bankruptcy, “any payment by the bankrupt to any of his creditors, or any payment or delivery to the bankrupt, or any conveyance or assignment by the bankrupt for valuable consideration, or any contract, dealing, or transaction, by or with the bankrupt for valuable consideration,” provided, to put it shortly, the transaction takes place before the date of the receiving order, and the person dealt with (other than the debtor) has no notice of any available act of bankruptcy committed by the bankrupt before that time.

Notice means either knowledge, or wilfully abstaining from acquiring it (*Bird v. Bass*, 1843, 6 Man. & G. 142; *Hope v. Meek*, 1855, 25 L. J. Ex. 41; *Ex parte Snowball*, in *re Douglas*, 1872, L. R. 7 Ch. 534; *In re Sedgwick*, *Ex parte Hobbs*, 1892, 9 Mor. Bky. 217).

Notice to a solicitor in relation to a matter in which he is employed, is notice to his client (*Pennell v. Stephens*, 1849, 7 C. B. 987; *Rothwell v. Timbrell*, 1842, 1 D. N. S. 778).

The onus of proving want of notice is upon the person who relies on the want of notice (*In re Tollemache* (No. 2), 1884, 13 Q. B. D. 727).

REALISATION OF PROPERTY.—The trustee, as soon as possible, is to put himself in possession of the whole of the bankrupt's property, as well as of the deeds, books, and documents of the bankrupt, and for the purpose of facilitating dealing with such property, as stock, shares in ships, or any property transferable in the books of any company, office, or person, he may exercise the same power of transfer that the bankrupt would have had (B. A., s. 50). He, the trustee, is not required to get himself admitted tenant to any copyholds; and choses in action are to be deemed duly assigned to him. Property in possession of the bankrupt may be seized under warrant of the Court, houses or receptacles belonging to him may be broken open, and search warrants issued where there is reason to suppose that property of the bankrupt is concealed in a house or place not belonging to him. All moneys received by the trustee, or proceeds of realisation, are required to be paid by him at once into an account at the Bank of England, entitled the “Bankruptcy Estates Account.” If a trustee retains a sum exceeding £50 for more than ten days, he is liable to be charged interest upon it at the rate of 20 per cent. per annum, lose his remuneration, and be removed (B. A., s. 74 (6))—a cumulative retribution made necessary by the frailty of trustees.

PROOF OF DEBTS.—The policy of the law being to set the debtor free—to discharge him, as Mellish, L. J., said in *In re Peacock*, 1872, L. R. 8 Ch. 685, from all the claims of his creditors—it is a necessary condition that all creditors—all persons, that is, entitled to share in the assets—should be enabled to come in, whatever the nature of their claim, and with this view

the Bankruptcy Act (s. 37 (3)) provides that "all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge, by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy." To the generality of this principle, there are, however, two exceptions. Unliquidated damages are not provable, nor is any debt or liability contracted with a person having notice of any act of bankruptcy available against the debtor. The first of these exceptions depends on the supposed difficulty of assessing damages, of which a jury alone can properly judge; but, as on modern principles nothing is incapable of being estimated, the reason for retaining this exception seems not very satisfactory. Damages are provable, if liquidated by agreement before bankruptcy, or if judgment is signed before the receiving order. The second exception is obviously just. A person who chooses to contract with a debtor who has made himself liable to bankruptcy proceedings, disentitles himself by such imprudence to diminish, by proving, the fund available for meritorious creditors.

"Liability," as defined by s. 37 (8) of the Act, has the widest significance. If, in the opinion of the Courts, the debt or liability is incapable of being fairly estimated, it is not to be provable in bankruptcy (s. 37 (6)); and if not provable, it is not released by the bankrupt getting his discharge, and may be enforced whenever the creditor chooses; but though the Court will not stay the action, it will not allow execution to issue on the judgment in such an action, either against the property or person of the bankrupt, till after discharge (*Cobham v. Dalton*, 1875, L. R. 10 Ch. 655). Very few debts are, however, in these actuarial days, incapable of estimation. The chance of a widow, for instance, marrying again is one which may be estimated (*In re Blakemore*, 1877, 5 Ch. D. 372), or of a separated wife remaining chaste (*In re Batcy*, 1880, 14 Ch. D. 579), or of a husband and wife resuming cohabitation after separation (*ibid.*). But future alimony is not provable (*In re Linton*, 1884, 15 Q. B. D. 239). Damages in tort are only provable where judgment is signed before the date of the receiving order (*In re Newman*, 1876, 3 Ch. D. 494).

Costs awarded before the date of a receiving order are provable, though they have not been taxed or judgment signed for them, obligation in the section not being confined to obligations incurred by reason of a contract (*In re Duffeed*, 1872, L. R. 8 Ch. 682). So, where a person agrees to arbitrate, costs given by the award after he becomes bankrupt are provable (*In re Smith*, 1886, 3 Mor. Bky. 179).

Where an annuity is to be proved, the Act converts the annuity for purposes of proof into a gross sum immediately payable (*In re Parnell*, 1879, 11 Ch. D. 914). The estimated value cannot be affected by the death of the annuitant after distribution of dividend, though the result is that the annuitant's estate receives more than twenty shillings in the pound. It is different if the annuitant dies before the trustee accepts the estimate, and any dividend is declared (*In re Dodds*, 1890, 59 L. J. Q. B. 403).

A wife who lends money to her husband, for the purpose of his trade and business, may prove in his bankruptcy, but only after all claims of other creditors for value have been satisfied (Married Women's Property Act, 1882, s. 3). The wife in such a case is treated as a quasi- or dormant partner. But if the money is not lent to the husband "for the purposes of his trade or business," there is nothing to prevent the wife proving like any other creditor (*Mackintosh v. Pogdse* [1895], 1 Ch. 505). The Partnership Act,

1890, s. 3, prevents a partner or quasi-partner proving in competition till all the creditors are paid in full.

A creditor, who has proved under a foreign bankruptcy, must give credit for the amount received, if he comes to prove here (*Banco di Portugal v. Waddell*, 1879, 5 App. Cas. 161).

Debts so called, which are contrary to the policy of the law, cannot be proved at all; for the sufficient reason that they are not recognised as debts by the law. A bond given as "*premium pudoris*" is an example (*Ex parte Mumford*, 1768, 15 Ves. 290; *Ex parte Bolland*, 1832, 1 M. & A. 570; *Ex parte Bell*, 1813, 1 M. & S. 751; 14 R. R. 567), where a debt is founded on a felony, e.g. embezzlement, proof is not allowed until the creditor has done his best to prosecute, for public justice must first be vindicated (*Ex parte Jones*, 1833, 3 Deac. & Ch. 525; but see *In re Shepherd*, 1878, 10 Ch. D. 667).

Where the debt sought to be proved is a judgment debt, the Court may go behind it, to see whether the debt is a real one, or obtained by fraud or collusion (*In re Onslow*, 1874, L. R. 10 Ch. 373, where the debt was for jewellery supplied to the bankrupt during infancy; *In re Lennox*, 1885, 16 Q. B. D. 315); but some evidence must be brought before the Court to impeach the judgment (*In re Flatau*, 1889, 22 Q. B. D. 834; *In re Saville*, 1887, 4 Mor. 277). The rule against double proof has been somewhat relaxed by r. 18 of the second schedule to the present Act. Every debtor is to prove promptly. His proper mode of doing so is by delivering or sending through the post in a prepaid letter to the official receiver, or, if a trustee has been appointed, to the trustee, an affidavit verifying the debt (B. A., 2nd Sched. r. 2, form 72). The affidavit must be by the creditor himself, or some person authorised by him. It must refer to a statement of account showing particulars of the debt, and specify vouchers. It must also state whether the creditor is secured or not. The creditor must bear the cost of proving his debt (B. A., Sched. ii. r. 6).

The trustee is to examine every proof, and admit or reject it in whole or part. If he rejects it, he is to state in writing to the creditor the grounds of the rejection (B. A., 2nd Sched. r. 22). If the creditor is dissatisfied, he may apply to the Court (*ibid.* r. 24).

SECURED CREDITOR.—A secured creditor has four courses open to him—(1) He may rest on his security, and not prove; (2) He may realise his security, and prove for the deficiency; (3) He may value his security, and prove for the deficiency, after deduction of the assessed value; (4) He may surrender his security, and prove for the whole debt (B. A., s. 9 (2); B. R., Sched. ii. 9–16). If he values his security, the trustee may redeem at the assessed value. This is an ingenious rule, because the secured creditor's propensity in valuing is to depreciate—to say, "It is naught, it is naught." The trustee in such a case takes him at his word, and any undervalue by a creditor thus tells against himself. The trustee may also require the security to be offered for sale. On the other hand, if the creditor overvalues his security, he cannot prove for more than the balance, though the security realises less than his valuation (*In re Hopkins*, 1878, 8 Ch. D. 378). If there are several securities, the creditor may lump them together; but if the trustee wishes to redeem a particular security, he may call on the creditor to value them separately (*In re Smith & Logan*, 1895, 2 Manson, 70). The creditor is also entitled to call on the creditor to elect whether he will or will not redeem; and if the trustee does not within six months signify his intention to redeem, he disentitles himself to redeem altogether.

Amendment of valuation or proof will be allowed in proper cases, *e.g.* where the creditor has made the valuation *bond fide* on a mistaken estimate (see *In re Newton*, 1896, 3 Manson, 200).

PREFERENTIAL DEBTS.—Although the policy of the law is an even-handed distribution of the assets *pro rata*, there are certain classes of debts to which the Legislature has thought fit, in the Preferential Payments Bankruptcy Act, 1888, to give priority.

These are—(1) Rates and taxes, “thesaurus regis,” as Coke calls them (3 Co. Lit. 12), “paci vinculum et bellorum nervi.” (2) The wages or salary of any clerk or servant, not exceeding £50, in respect of services rendered during four months prior to the receiving order. (3) Wages of any labourer or workman, not exceeding £25, for services—whether time or piece work—rendered during two months prior to the date of the receiving order (P. P. A., s. 1). As to the two latter priorities there is a double reason. The creditors are only small creditors, and their services have helped to make the assets, and are, in a sense, salvage. All these debts have priority over even a landlord's right of distress (*ibid.*). (4) The Crown has no priority, being bound expressly by sec. 100 of the Bankruptcy Act.

SET-OFF.—It is obvious that where A. owes B. £100, and B. owes A. £100, and B. becomes bankrupt, it is of the first importance to A. whether he can set-off his debt to B. against what B. owes him, or whether he must pay B., or rather B.'s trustee in bankruptcy, in full, and only get a dividend of 2s. 6d., say, in the pound from B.'s estate. Such right of set-off is by no means, of course, because A.'s debt is obviously an asset of B.'s estate, in which all the creditors are entitled to share. Set-off takes that asset, and uses it to pay one creditor, perhaps, twenty shillings in the pound, in preference to the others. This is contrary to the first principles of bankruptcy law. On the other hand, where A. and B. have a running account of mutual debts and credits, it is only consonant with good sense and fairness to say that what is due from A. to B., or B. to A., is what remains after striking a balance. This is the principle which bankruptcy law has adopted, under what is known as the “mutual credits section” (s. 38) of the Bankruptcy Act. The substance of this section is, that where there have been “mutual credits, mutual debts, or other mutual dealings” between a debtor, against whom a receiving order has been made, and a person claiming to prove under the receiving order, an account is to be taken, the cross-claims set off, and the balance of the account, and no more, claimed or paid on either side respectively. The latest cases are: *Palmer v. Day & Sons* [1895], 2 Q. B. 618, and *In re Mid Kent Fruit Co.* [1896], 1 Ch. 567.

The line as to set-off is drawn at the commencement of the bankruptcy (*In re Gillespie*, 1885, 2 Mor. Bky. 100).

INTEREST.—Interest at 4 per cent. down to the date of the receiving order may be proved on an overdue debt, from the date when the debt was due or demand made (B. A., Sched. ii. r. 20). Interest subsequent to the receiving order can only be proved if there is a surplus (s. 40 (5), *In re Savin*, 1871, L. R. 7 Ch. 764; *Quartermaine's Case* [1892], 1 Ch. 639).^a Abuses sometimes occurred under the Act of 1883, where the debt proved was one which included interest, or a bonus in lieu of interest. Money-lenders' debts were an instance, and instalments on bills of sale. To meet these cases, the Bankruptcy Act of 1890 has provided that in such cases interest is to be calculated for purposes of dividend at 5 per cent. per annum, without prejudice to the creditor's right to receive out of the estate any higher rate

of interest to which he may be entitled, after all the proved debts have been paid in full. The interest on debts not presently payable is provided for by rule 21, and the principle is explained by Lord-Justice Lindley (*In re Browne & Wingrove* [1891], 2 Q. B. 574).

ANNULLING ADJUDICATION.—Where, in the opinion of the Court, a debtor ought not to have been adjudged a bankrupt, or where it is proved, to the satisfaction of the Court, that the debts of the bankrupt are paid in full, the Court is empowered to annul the adjudication (B. A., s. 25), as in old days the Lord Chancellor had power to supersede the commission. As to what is payment in full, see *In re Burnett*, 1894, 1 Manson, 89.

The annulment does not affect any sales or dispositions duly made under the bankruptcy.

The Court has a similar discretionary power to rescind a receiving order (*In re Leslie*, 1889, 18 Q. B. D. 619; *In re Hester*, 1889, 6 Mor. Bky. 85).

COSTS.—Costs in bankruptcy are of two kinds—(1) Costs of administration; (2) Cost of legal proceedings. With regard to the former, sec. 73 of the Act provides that all bills and charges of solicitors, managers, accountants, auctioneers, brokers, and other persons are to be taxed by the prescribed officer. The persons so employed are to deliver their bills for taxation within seven days after request by the trustee, and no payments are to be made without proof of taxation.

A trustee or manager who receives remuneration for his services is not to be allowed any payment in respect of the performance by any other person of his (the trustee's) ordinary duties. If the trustee is a solicitor, he may contract that his remuneration shall include professional services. The one-sixth rule does not apply in bankruptcy taxation (*Ex parte Marsh*, 1884, 15 Q. B. D. 340).

With regard to the cost of proceedings, rule 108 provides that, in the absence of any express direction, costs of an opposed motion shall follow the event, and shall be taxed as between party and party, but the Court may allow taxation as between solicitor and client. The scale of solicitors' costs, and of allowances to brokers and accountants, is given in part ii. of the Appendix to the Act. When costs have been taxed by the registrar of the County Court, the Board of Trade may have the taxation reviewed (B. R. 124; *In re Marsh*, 1894, 71 L. T. 776). The order in which costs and charges payable out of the estate are to be paid is provided for by rule 125.

CONSTITUTION OF THE BANKRUPTCY COURT.—The old London Bankruptcy Court is now consolidated with and forms part of the Supreme Court of Judicature, and the jurisdiction of the old Court is transferred to the High Court (B. A., s. 94), and is now assigned to the Queen's Bench Division of the High Court. The judge assigned by the Lord Chancellor, under sec. 94 (2), for the purposes of bankruptcy business, including the powers of the Court under sec. 5 of the Debtors Act, 1869, is Mr. Justice Vaughan Williams. He is assisted by five registrars in bankruptcy, who are registrars of the High Court and possess a large jurisdiction. They have power—(a) To hear bankruptcy petitions, and to make receiving orders and adjudications thereon; (b) To hold the public examination of debtors; (c) To grant orders of discharge and certificates of removal of disqualifications; (d) To approve compositions and schemes of arrangement; (e) To make interim orders in any case of urgency; (f) To make any order or exercise any jurisdiction which, by any rule in that

behalf, is prescribed as proper to be made or exercised in chambers; (g) To hear and determine any unopposed or *ex parte* application; (h) To summon and examine any person known or suspected to have in his possession effects of the debtor, or to be indebted to him, or capable of giving information respecting the debtor, his dealings, or property. But a registrar has no power to commit for contempt of Court, nor to exercise the jurisdiction and powers under the Debtors Act, 1869. Matters or applications may be adjourned—though the registrar has jurisdiction to hear them—to be heard before the judge in open Court, if (1) the parties desire it, or (2) if one of them desires it and the registrar is of opinion that it involves a question of difficulty on the ground of novelty or otherwise.

The County Courts exercising jurisdiction in bankruptcy are the Courts which possessed such jurisdiction at the commencement of the present County Courts Act, and have not been excluded from doing so by an order of the Lord Chancellor.

A County Court has, for the purposes of its bankruptcy jurisdiction, all the powers and jurisdiction of the High Court (B. A., s. 100). Thus a County Court judge may commit for contempt a witness who disobeys an order to attend for examination (*R. v. County Court of Surrey*, 1883, 13 Q. B. D. 963).

The registrars of County Courts have similar powers to the registrars of the High Court in bankruptcy, except that they cannot grant discharges or approve compositions or schemes, if the application is opposed.

GENERAL JURISDICTION OF THE COURT IN BANKRUPTCY.—When a debtor's estate comes to be administered in bankruptcy, it is plain that a number of questions will arise between the estate and strangers to the bankruptcy. For example, the trustee may have a mere money demand against a person who has dealt with property of the bankrupt (*In re Dicken, ex parte Pollard*, 1878, 8 Ch. D. 377; *In re Wood, ex parte Musgrave*, 1879, 10 Ch. D. 94), or a claim against the bankrupt's landlord for an excessive distress levied before the bankruptcy (*In re Cliffe, ex parte Eatough & Co.*, 1880, 42 L. T. 95). In such case it was decided that the trustee should avail himself of the ordinary tribunals for the determination of such questions, and only proceed in bankruptcy where he was claiming by virtue of some higher title than the debtor; for instance, that goods of a third party belonged to him, the trustee, by virtue of the reputed-ownership doctrine, or to set aside a settlement as fraudulent against creditors of the bankrupt; the view being that the Court of Bankruptcy was not intended, as Lord Selborne put it, in *In re Motion*, 1873, L. R. 9 Ch. 192, 210, to draw compulsorily within the sphere of its jurisdiction property, or the owners of property, not vested in the assignee, and not originally subject to the administration in bankruptcy.

JURISDICTION OF THE BANKRUPTCY COURT.—The effect of the new section (s. 102) of the Bankruptcy Act, 1883, is to invest the Court in bankruptcy with jurisdiction to decide all questions arising in the bankruptcy, but there is this qualification in the case of County Courts having bankruptcy jurisdiction.

In the case of the High Court, too, though the jurisdiction exists to determine questions arising between the trustee in bankruptcy and strangers to the bankruptcy, the Court has a discretion as to exercising it (*In re White & Co.*, 1884, 1 Mor. Bky. 77), and will not in general withdraw causes or matters from the ordinary tribunals. Thus, where a motion was made to the judge in bankruptcy, by the trustee of a bankrupt mortgagor, to have an action brought by the mortgagee in the Chancery Division, to realise

his security, transferred to the judge in bankruptcy, the Court dismissed the motion with costs.

In re Somes, 1895, 2 Manson, 396, the judge in bankruptcy ordered an action for administration of a deceased partner's estate to be transferred to himself, on the application of the trustee in bankruptcy of the surviving partner.

APPEALS AND REHEARINGS.—Every Court having jurisdiction in bankruptcy under the Act, may review, rescind, or vary any order made by it under its bankruptcy jurisdiction (*In re Tobias*, 1891, 8 Mor. Bky. 30). The power, however, is one to be exercised with great caution. Only the Court, which made the order can rehear the matter. It is frequently exercised in rescinding receiving orders and reconsidering refusals of discharge. Besides, the power of rehearing an appeal in bankruptcy matters lies at the instance of "any person aggrieved" (B. A., s. 104 (2)). See AGGRIEVED. An appeal from the decision of a County Court is to a Divisional Court sitting in bankruptcy. Any further appeal to the Court of Appeal can only be by leave of the Divisional Court. As to when leave will be granted, see *In re Campbell*, 1884, 14 Q. B. D. 32. Solicitors have a right of audience on an appeal to the Divisional Court (*In re Barnett*, 1884, 15 Q. B. D. 169), but this does not extend to the Court of Appeal (*In re Elderton*, 1887, 4 Mor. Bky. 36). An appeal from the judge in bankruptcy, or from one of the registrars of the High Court in bankruptcy, is to the Court of Appeal, and must also be brought within twenty-one days (*In re Courtenay*, 1884, 1 Mor. 89). Higher the dissatisfied litigant can only go by leave of the Court of Appeal (B. A., s. 104 (b) (c)). An appeal to the Court of Appeal must be brought within twenty-one days (B. R. 130).

ADMINISTRATION ORDER.—Those who are familiar with the Court of Bankruptcy know that a procession of debtors is constantly coming up before that tribunal on judgment summonses for committal, under the Debtors Act, 1869, s. 5. Each debtor has his inexorable and often justly exasperated creditor, who declares that the debtor can pay and won't pay, and presses the Court to pronounce the last penalty of the law on the defaulting debtor—imprisonment (*In re Park*, 1885, 14 Q. B. D. 597). Then ensues a strife as to means, and mutual recriminations. What is the judge to do? The Bankruptcy Act now gives the judge two alternatives—both beneficial. First, a discretionary power is given him to decline to commit, and in lieu thereof to make a receiving order (B. A., s. 103 (5); *In re Fryer*, 1886, 17 Q. B. D., 718; *In re Andrews*, 1885, 2 Mor. Bky. 244; *In re Hughes*, 1887, 4 Mor. Bky. 236); such receiving order is, it is true, to be made by the terms of the section, with the consent of the judgment creditor, and on payment by him of the prescribed fee, but for practical purposes this qualification is nugatory, because, if he unreasonably refuses his consent, the Court may simply dismiss the summons. If a receiving order is made, the debtor is to be deemed to have committed an act of bankruptcy at the date of the order, or at the date of any earlier act of bankruptcy proved against him, within three months prior to the receiving order (B. A., 1890, s. 20). The other alternative may be described as bankruptcy in miniature, and it applies to the County Court only. When a judgment has been obtained in such a Court, and the debtor is unable to pay the amount forthwith, and alleges that his whole indebtedness amounts to a sum not exceeding £50, inclusive of the debt for which the judgment is obtained, the County Court may make an order providing for the administration of his estate and for the payment of his debts

by instalments or otherwise, and either in full or to such extent as to the County Court, under the circumstances of the case, appears practicable, and subject to any conditions as to his future earnings or income which the Court may think just (B. A., s. 122 (1)). The order is not to be invalidated only because the total amount of the debts is found at any time to exceed £50. Such an administration order has a double recommendation. It relieves the debtor by enabling him to pay his debts by instalments; for after the making of the order no creditor is to have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a County Court, except with the leave of that Court, and on such terms as the Court may impose. Any County Court, too, or inferior Court in which proceedings are pending against the debtor, is to stay them on notice of the order. A cheap mode is also provided for realising the debtor's assets when they exceed £10, by the registrar, at the request of any creditor and without fee, issuing execution against the debtor's goods, that is, against what may be termed his surplus assets; for the debtor's household goods, wearing apparel, and bedding, and the tools and implements of his trade, to the value in the aggregate of £20, are protected from seizure. The proceeds of the execution are paid by the bailiff to the registrar.

IMPRISONMENT UNDER THE DEBTORS ACT.—The refusal or suspension of a bankrupt's discharge is one form of disciplinary jurisdiction which the Court exercises over misconducting debtors. But there is a higher sanction provided for dishonesty by the Debtors Act, 1869. That Act, in abolishing—to speak generally—imprisonment for debt, reserved certain cases in which debtors were not to enjoy this immunity, but were to expiate their offence in “*durance vile*.” For instance, if a person makes default in payment of a penalty (other than a penalty in respect of a contract), or of a sum recoverable summarily before a justice of the peace, or in case of default by a trustee in paying any sum ordered to be paid by him, or in case of default by a solicitor in payment of costs for misconduct, or default by a debtor in paying over for the benefit of creditors any portion of salary or income which he has been ordered to pay, or default in payment of sums in respect of the payment of which any Court having jurisdiction in bankruptcy is authorised to make an order—the defaulter may be sent to prison (D. A., s. 4). Then, by sec. 5 of the same Act, any Court may commit to prison, for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt due from him, in pursuance of any order or judgment of that or any other competent Court.

This may appear at first sight at variance with the principle of the Debtors Act, that no person shall be arrested or imprisoned for “making default in payment of a sum of money”; but it is not in truth so, and for this reason, that the jurisdiction to send a judgment debtor to prison is only to be exercised where it is proved, to the satisfaction of the Court, “that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same” (*ib.* s. 5 (2)). In other words, the Court must be satisfied that the debtor has had the means of paying the debt and has not done so. This, as Lord Bramwell points out, in *Stonor v. Fowle*, 1888, 13 App. Cas. 20, 28, is not mere default, but dishonesty, and it is for this dishonesty, not for mere indebtedness, that the penalty of imprisonment is inflicted. The imprisonment is a pure punishment. It does not cancel the debt. As to what are means, see

Harper v. Scrimgeour, 1880, 5 C. P. D. 366, and *Ex parte Fryer*, 1885, 3 Mor. 231. To prove means, the debtor and any witnesses may be summoned and examined on oath. If the debtor have the means of paying, the amount of the debt is immaterial (*Lewis' case*, 1873, 42 L. J. Ch. 379). In estimating means, money derived from a gift may be taken into account (*In re Park*, 1885, 14 Q. B. D. 597). The Court cannot, in ordering payment by instalments, make a prospective order for commitment; but once default has been made, the order of commitment may be made, and suspended if the instalments are duly paid.

The power of commitment is a responsible one, and it is only intrusted, in the case of the County Courts, or any Courts other than the superior Court, to the judge or his deputy. It must be exercised in open Court.

A married woman cannot be committed under sec. 5 of the Debtors Act, because the ordinary form of judgment against her does not make her personally liable, but only operates against her property (*In re Morley*, 1887, 20 Q. B. D. 120).

CRIMINAL PROCEEDINGS.—The Debtors Act having meted out six weeks for defaulting judgment debtors, goes on to provide—in more stringent terms—for the punishment of fraudulent debtors (s. 11):—if, for instance, the bankrupt does not, to the best of his knowledge, discover all his property; if he does not deliver up to the trustee all his property, which is in his custody or under his control (1), as well as all books, documents, papers (2), relating to such property (3); if he cancels any part of his property to the value of £10 or upwards, or any debt (4), or fraudulently removes any part of his property (5), or makes a material omission in any statement relating to his affairs (6), or allows a false debt to be proved (7), or prevents the production of any book, document, or paper relating to his property or affairs (8), or conceals, destroys, mutilates, or falsifies any book or document affecting or relating to his property or affairs, or is privy to such concealment, etc. (9), or makes, or is privy to making, any false entry in any book or document, affecting or relating to his property or affairs (10), or fraudulently parts with any such document, or alters it or makes an omission in it (11), or attempts to account for any of his property by fictitious losses or expenses (12), or within four months of the commencement of bankruptcy obtains any property on credit by false representations or other fraud (13), or obtains any property on credit, under false pretence of carrying on business (14), or pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit (15), or is guilty of any false representation or other fraud, for the purpose of obtaining the consent of his creditors or any of them, to any agreement with reference to his affairs or his bankruptcy—for any of the above offences, a bankrupt is liable to imprisonment for any term not exceeding two years, with or without hard labour (D. A., s. 11). It makes no difference now, in these cases or the case of absconding (see *infra*), whether the bankruptcy is on a petition by a creditor or by the debtor, or is based on a receiving order in lieu of committal, under sec. 103 (5) of the Bankruptcy Act.

A bankrupt's absconding from England, or trying to abscond, with property to the amount of £20, which ought to go to his creditors, is felony, punishable with imprisonment for two years, with or without hard labour (s. 12). It is likewise a misdemeanour—one year with or without hard labour—if a person, in incurring any debt or liability, has obtained credit under false pretences, or by any fraud, or has, with intent to defeat or delay

his creditors, or any of them, made any gift, delivery, or transfer of, or any charge on, his property.

An undischarged bankrupt, obtaining credit to the extent of £20 or upwards from any person, without informing such person that he is an undischarged bankrupt, is guilty of misfeasance under the Debtors Act, 1869 (B. A., s. 31). It is sufficient under this section to constitute the offence, that credit was obtained, though there was no agreement to give it (*R. v. Peters*, 1886, 16 Q. B. D. 636). Keeping goods to the value of £20 is within the section, though the order for goods was less (*R. v. Juby*, 1887, 55 L. T. 788). The Court may commit a bankrupt for trial for any misdemeanour under the bankruptcy law, and has, for this purpose, all the powers of a stipendiary magistrate (B. A., s. 165); and it is no bar that the bankrupt has got his discharge (B. A., s. 167). Where the Court has ordered a prosecution for any offence under the Debtors Act, 1869, or for any offence arising out of any bankruptcy proceedings, it shall be the duty of the Director of Public Prosecutions to institute and carry on the prosecution (B. A., s. 166). The form of indictment need only set forth the substance of the offence charged, specifying the offence, as nearly as possible, in the words of the Act (D. A., 1869, s. 19). A bankrupt is not protected from being convicted for fraud, under ss. 75 to 84 of the Larceny Act, 1862 (fraud by agents, bankers, or factors), because he has first disclosed the offence in any compulsory examination or deposition before any Court, on the hearing of any matters in bankruptcy or insolvency (B. A., 1890, s. 27), but such statement or admission is not admissible in evidence under sec. 85 of the Larceny Act in proceedings against him.

Forty-eight prosecutions were, according to the last return, ordered in 1895, eleven in the High Court, thirty-seven in the County Court, and in thirty-two cases convictions were obtained, three in the High Court proceedings, twenty-nine in the County Court proceedings.

COMPOSITION OR SCHEME OF ARRANGEMENT.—The present Bankruptcy Acts, 1883 and 1890, allow a composition or scheme of arrangement, as an alternative to the rigour of bankruptcy (B. A., 1890, s. 3, superseding B. A., 1883, s. 18); such arrangements are equivalents of the liquidation by arrangement under the Bankruptcy Act of 1869, but the Legislature has fenced in a composition or scheme with so many precautions and safeguards, as effectually to secure it from the abuses which occurred under the Act of 1869. The chief of these safeguards is in requiring the approval of the Court, which is to be given on certain well-defined and somewhat strict terms, and not till after the public examination of the debtor is concluded. A deed of arrangement entered into before a receiving order, though such deed is approved by every creditor but one, is no sufficient cause for not making a receiving order on the petition of the dissentient creditor (*In re Dixon & Wilson*, 1884, 13 Q. B. D. 118; *In re Watson & Smith*, 1884, 2 Mor. Bky. 199). The course of proceeding is as follows: The creditors having, at the first meeting, resolved to entertain a proposal for composition or a scheme of arrangement, the debtor is, within four days of submitting his statement of affairs, to lodge with the official receiver a proposal, signed by him, embodying the terms of the composition or scheme, and setting out particulars of any sureties or securities proposed. The official receiver then summons a meeting of creditors, sending to each creditor, before the meeting, a copy of the debtor's proposal, with a report thereon; and if at such meetings a majority in number and three-fourths in value of all the creditors who have proved, resolve to accept the proposal, the same shall be deemed to be duly

accepted by the creditors. Any creditor may, by letter to the official receiver, assent to or dissent from the proposal, and such assent or dissent is to have the same effect as if the creditor had been present and had voted at the meeting. Only half the debtor's task is accomplished, however, with the acceptance of the creditors. The Court has still to be persuaded. The application is made by the debtor or the official receiver; and notice of the application is to be given to the creditors, any of whom may oppose, though he has voted for the scheme. Then the Court is to hear a report of the official receiver as to the terms of the scheme and as to the conduct of the debtor; and if it is of opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required, where the debtor is adjudged bankrupt, to refuse his discharge,—that is to say, where the debtor has committed a misdemeanour under the Debtors Act, 1869, or the Bankruptcy Act, or any felony connected with his bankruptcy,—the Court shall refuse to approve the proposal. It has no option. If any facts are proved on which the Court would be required either to refuse or suspend the debtor's discharge, or attach conditions to it, were he adjudged bankrupt,—as where the debtor has omitted to keep books of account, continued to trade knowing himself insolvent, brought on his bankruptcy by rash and hazardous speculations (*In re Young*, 1884, 2 Mor. Bky. 37; *In re Salaman*, 1884, 42 Mor. Bky. 61), given an undue preference or defended actions frivolously or vexatiously,—the Court is bound to refuse its approval to his proposal, unless the proposal provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate; but the debtor paying seven shillings and sixpence does not oblige the Court to approve (*In re Burr* [1892], 2 Q. B. 467)). No proposal is to be approved if it does not provide for all proper priorities. Approval is signified by the seal of the Court being attached to the instrument embodying the proposal. There are certain debts, however, from which the composition, like the discharge in bankruptcy, does not release the debtor,—liability under a judgment against him for seduction, or under an affiliation order, or under a judgment against him as co-respondent in a matrimonial cause; nor does it release him from debts and liabilities from which a discharge in bankruptcy would not release him, *i.e.* for fraud or fraudulent breach of trust (B. A., s. 19; *Flint v. Barnard*, 1889, 22 Q. B. D. 90). Costs of an action against a fraudulent trustee are not a debt or liability incurred by means of fraudulent breach of trust (*In re Greer*, *Napper v. Fanshawe*, 1894, 2 Manson, 350).

If a debtor has made a fraudulent or unjustifiable settlement, covenant, or contract, the Court may refuse its approval to the scheme (B. A., s. 29). These restrictions on the power of approval are designed in the interests of commercial morality. It has been repeatedly recognised by the Court of Appeal that it is not enough that a scheme is beneficial to creditors. The conduct of the debtor must be weighed; and the Court must assume a commercial censorship, balancing the two considerations—the claims of creditors and the claims of trading morality—as best it may (*Ex parte Rogers*, 1884, 13 Q. B. D. 438. A scheme of arrangement must also give the creditors some advantage which they would not have in bankruptcy (*In re Aylmer*, 1887, 19 Q. B. D. 33; *In re Dixon & Cadmus*, 1887, 5 Mor. Bky. 291; *In re Hester*, 1888, 6 Mor. Bky. 85).

It often happens that a sanguine debtor enters into an arrangement or composition which he finds himself unable afterwards to carry

out. He makes default in the payment of an instalment. In such a case, under the older Bankruptcy Acts of 1861 and 1869, the creditors were remitted to their original rights. They might bring actions for their debts. Now their only remedy is to get the debtor adjudicated a bankrupt. The same remedy is prescribed where the Court is satisfied that the composition or scheme cannot, in consequence of legal difficulties, or for any sufficient reason, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud. A composition or scheme of arrangement can be entered into after adjudication as well as before (B. A., s. 23).

SMALL BANKRUPTCIES.—One salutary provision of the Act of 1883 is that of summary administration in the case of small bankruptcies. By a small bankruptcy is meant one where the property of the debtor is not likely to exceed in value £300. The object in such a case is to save expense and simplify procedure, and with this view the official receiver is trustee and the Board of Trade exercises the functions of a committee of inspection; but there is no relaxation of the disciplinary jurisdiction of the Court. The bankrupt must go through the ordeal of his public examination and obtain his discharge on the ordinary terms. The application for summary administration under sec. 121 is made by the official receiver (form 44, App.); and, on his report that the estate is under £300, the order ought, as a rule, to be made, unless there is some reason to the contrary (*In re Hornblow*, 1884, 2 Mor. Bky. 124). All documents are headed "summary case." No advertisements of proceedings are inserted in local papers. The Court is to determine all questions of law and fact without a jury. Failing a composition, the Court may forthwith adjudge the debtor bankrupt. Notices of meetings other than the first are not to be sent to creditors for under £3; the estate is to be realised with all reasonable despatch, and where practicable is to be distributed in one dividend; if practicable, within six months. No appeal can be brought without leave (*In re Dale*, 1884, 2 Mor. Bky. 92; and see *In re Richards*, 1887, 4 Mor. Bky. 233). It is a striking testimony to the usefulness of this legislative machinery, that no less than 3687 orders were made in 1895 for summary administration under sec. 121; 529 in the High Court, and 3158 in the County Court.

ADMINISTRATION OF ESTATE OF DECEASED INSOLVENT.—The Bankruptcy Act having provided the requisite machinery for administration of bankrupt estates, it was only natural that the Legislature should utilise it for the analogous administration of deceased insolvents' estates; and accordingly we find in sec. 125 provisions for this purpose. Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor had he been alive, may present the petition for administration. Notice is given to the executor or administrator; and if the Court is not satisfied that there is a reasonable probability of the estate being sufficient for the payment of the deceased's debts, it may make the order. If there are proceedings in Chancery, they may be transferred, and in such a case the costs of the action are payable out of the estate as testamentary expenses (*In re J. Chapman*, 1883, 1 Manson, 413). A petition for administration may be presented, though there is no administrator as yet appointed (*In re Sleet* [1894], 2 Q. B. 797). The powers to set aside voluntary settlements (B. A., s. 47), and summon witnesses as to the estate (B. A., s. 27), do not apply in the administration of a deceased insolvent's estate (*In re Gould*, 1887, 19 Q. B. D. 92; *In re Hewitt*, 1885, 15 Q. B. D. 159).

DISCHARGE.—One of the special features of the legislation embodied in the Bankruptcy Act of 1883 is the disciplinary jurisdiction which it gives to the Court over debtors. The Act recognises that bankruptcy is not a matter merely between a man and his creditors: that the whole trading community is concerned in the maintenance of a high standard of commercial integrity and the extermination of fraud. This policy is evinced in the sections dealing with the Court's sanctioning of schemes of arrangements, but it is still more strongly evinced in the increased stringency of the provisions governing a bankrupt's discharge.

A bankrupt may at any time after his adjudication apply to the Court for an order of discharge (B. A., 1890, s. 8), but the application is not to be heard until the public examination of the debtor be concluded; that is, until a searching investigation has been instituted into his affairs. Furthermore, the Court is, at the hearing of the application, to take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings. Armed with these materials, the Court is to hear the application in open Court, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge, subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property. This invests the Court with a large discretion, but this discretion is reduced within narrow limits by the provisions which follow. These provide that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, or the principal Act, or any other misdeameanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the Court otherwise determines. In all these cases the Court "shall refuse." This means that a debtor who has been guilty of such offences is unfit to be re-admitted as a member of the trading community (*In re Richardson & Webster*, 1887, 4 Mor. Bky. 22).

"The felony connected with his bankruptcy" here mentioned, means a conviction on facts which have resulted in or brought about the bankruptcy (*In re Hedley* [1895], 1 Q. B. 923).

There are, however, other offences not of such a grave character as the above, but which disentitle a bankrupt to an unconditional discharge. If it is proved, for instance,

(a) That the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities: unless he satisfies the Court that the fact that the assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible; or

(b) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy. This is a very bad offence (*In re Wallace*, 1884, 2 Mor. Bky. 167, 170). Books mean the usual books (*In re Mutton*, 1887, 19 Q. B. D. 102); or

(c) That the bankrupt has continued to trade after knowing himself to be insolvent; or

(d) That the bankrupt has contracted any debt provable in the bank-

ruptcy without having, at the time of contracting it, any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it (see *In re J. Williams*, 1884, 1 Mor. Bky. 91; and see *In re White, Winter, & Co.*, 1884, 2 Mor. Bky. 42); or

(e) That the bankrupt has failed to account satisfactorily for any loss of assets, or for any deficiency of assets to meet his liabilities; or

(f) That the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculations (*In re Salaman*, 1885, 14 Q. B. D. 936), or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs (*In re Stainton*, 1887, 4 Mor. Bky. 242. A man is not bound to keep up appearances, but is bound to pay his debts); or

(g) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him; or

(h) That the bankrupt has, within three months preceding the date of the receiving order, incurred unjustifiable expense by bringing a frivolous or vexatious action; or

(i) That the bankrupt has, within three months preceding the date of the receiving order, when unable to pay his debts as they became due, given an undue preference to any of his creditors. Undue preference here has a wider meaning than a "fraudulent preference" under sec. 48 (*In re Skegg*, 1890, 25 Q. B. D. 505; *In re Bryant*, 1894, 2 Manson, 37); or

(j) That the bankrupt has, within three months preceding the date of the receiving order, incurred liabilities with a view of making his assets equal to ten shillings in the pound on the amount of his unsecured liabilities; or

(k) That the bankrupt has on any previous occasion been adjudged bankrupt, or made a composition or arrangement with his creditors; or

(l) That the bankrupt has been guilty of any fraud or fraudulent breach of trust.

In all or any of these cases the Court may either (1) refuse the discharge; (2) suspend it for a period of not less than two years; (3) suspend the discharge until a dividend of not less than ten shillings in the pound has been paid to the creditors; (4) require the bankrupt to consent to judgment being entered against him for the balance of debts provable (*In re Clarkson*, 1884, 2 Mor. Bky. 219). The Court cannot grant an unconditional discharge (*In re Heap*, 1887, 4 Mor. Bky. 314). Execution in such a case, i.e. where judgment is entered, can only issue by leave of the Court. The Court cannot make a conditional order and also suspend the order of discharge (*In re Huggins*, 1888, 6 Mor. Bky. 38).

An order of discharge releases the debtor from all debts, speaking generally, provable in bankruptcy, and the tendency of each successive bankruptcy has been to enlarge the power of proof (*Hardy v. Fothergill*, 1890, 13 App. Cas. 351). The present Act makes every kind of claim, present or future, certain or contingent, provable. This is in accordance with the policy of bankruptcy law, that the debtor emerging from the portals of the Bankruptcy Court shall start a free man; but there are certain kinds or classes of debts—involving moral misconduct—from which the Legislature has not thought fit to release him. These are—

1. Debts or liabilities incurred by means of fraud, or fraudulent breach of trust to which the debtor was a party, or whereby he has obtained forbearance of any fraud to which he was a party.

2. Liability under a judgment against the debtor in an action for

seduction, or under an affiliation order, or under a judgment against him as a co-respondent in a matrimonial cause.

3. Penalties in respect of criminal offences.

The first of these exceptions brings the law into conformity with right reason and good sense. A debtor is not to be deprived, as he formerly was, of the benefit of his release when he has merely committed an innocent breach of trust; nor is he to be deprived of it because his co-trustee has committed a fraudulent breach of trust, if he was no party to the fraud.

A discharge granted by an English Court is a defence in any English Court to an action for debts covered by the release, wherever such debts may have been contracted. The certificate is made conclusive evidence, and is pleadable to all causes of action accrued before the date of the discharge (B. A., s. 30 (3); *Potter v. Brown*, 1805, 5 East, 125; 7 R. R. 663; and see Dicey's *Conflict of Laws*, 448, 449, 452).

PRIVATE DEEDS OF ARRANGEMENT.—No reasonable fault can be found with the mode in which the present bankruptcy law is worked. Official administration is thoroughly efficient, and admitted to be so; but it has two demerits in the eyes of the English trader: (1) that it is officialism, and (2) that it involves publicity. "Please govern me as little as possible," said Lord Bramwell; and most Englishmen, having a healthy love of independence, respond to the sentiment. To this the English trader adds: "This is a private matter between me and my creditors. If I can satisfy them by an arrangement, what has the State to do with it? I wish to avoid the publicity and stigma of bankruptcy. I am an honest man suffering temporary eclipse, and bankruptcy would deal a fatal blow at my commercial credit." There is much truth in this, and its practical outcome is to be seen in what used to be called a "Creditors' Deed," but are now known as "Private Deeds of Arrangement." As Lord Campbell pointed out long ago, they are frequently very advantageous both to creditors and the debtor. The composition offered may be considerably more than would be the dividend on an immediate sale and distribution of his effects, and he may be enabled to pay this composition from the assistance of friends, and from being permitted to avail himself of his position in the commercial world, which would be utterly lost if he were made a bankrupt. Private deeds of arrangement are, speaking generally, of three kinds—

1. Deeds of assignment for the benefit of creditors.
2. Deeds of composition.
3. Inspectorship deeds.

By a deed of assignment the debtor conveys his property—the particulars of which are specified in the schedules to the deed—to a trustee for the creditors, whose names and debts are scheduled to the deed, upon trust to realise at discretion, and after payment of expenses to distribute the proceeds rateably. An assignment for the benefit of creditors is revocable until communicated to them, but after communication it becomes irrevocable (*Synnott v. Simpson*, 1854, 5 H. L. C. 121). It cannot be impeached under 13 Eliz. c. 5, as a covinous or fraudulent conveyance—supposing it to be made for the fair purpose of equal distribution, and not as a cloak for retaining a benefit to the grantor—merely because it may operate to the prejudice of a particular creditor. So far from being a fraud, it is, as was said in *Pickstock v. Lyster* (1816, 3 M. & S. 371; 16 R. R. 300) the most honest thing that a debtor so circumstanced can do.

By a composition deed the debtor agrees to pay his creditors, say 7s. 6d. in the pound, by instalments, secured, perhaps, by a surety or sureties,

and the creditors give him a conditional release,—a release, that is, defeasible on non-payment or non-performance of covenants by the debtor.

It is one of the mysteries of our admirable common law that a debt cannot be discharged by payment of a less sum. A creditor can take, as Jessel, M. R., remarked in *Couldery v. Bartrum*, 1880, 19 Ch. D. 394, a horse or a tomtit in satisfaction of a debt, but he cannot take 19s. 6d. in the pound. If the Roman augurs could not meet without a smile, must not English lawyers too blush sometimes for *their* mysteries? At all events, the Courts have been sufficiently conscious of the irrationality of the doctrine in *Cumber v. Wane*, 1720, 1 Sm. L. C. 357, to distinguish it wherever they can, and they have done so in the case of composition deeds (*Good v. Cheesman*, 1832, 2 Barn. & Adol. 328). The result is that the mutual forbearance of the creditors will support the deed—two creditors even will do (*Norman v. Thompson*, 1850, 4 Ex. Rep. 755)—though the 19s. 6d. would not. A parol agreement is sufficient. After a composition deed has been executed, a compounding debtor is free to deal with his property (*In re Kearley & Clayton's Contract*, 1878, 7 Ch. D. 615; *In re Simons*, 1881, 16 Ch. D. 505) while the composition deed stands; and, on the same principle, the creditor who has acceded to the deed cannot maintain an action on his original debt unless the debtor has made default in carrying out his agreement. In doing so he would be breaking faith, not only with the debtor, but with every creditor party to the arrangement. As to the operation of the Statute of Limitations on the debt, see *Re Stock*, 1897, 75 L. T. 422.

Inspectorship deeds are the third kind of deeds of arrangement. These provide—substantially—for the debtor carrying on his business as before, but under the supervision of certain inspectors on behalf of the general body of creditors. For forms of the above deeds, see Winslow, *Private Deeds of Arrangement*. It is an implied condition in all such deeds, that all the creditors that come into the arrangement are on perfectly equal terms (*Daughish v. Tennent*, 1867, L. R. 2 Q. B. 49; *In re Milner*, 1884, 2 Mor. Bky. 191).

The Deeds of Arrangements Act, 1887, now provides for the registration of all such instruments, whether under seal or not, made for or in respect of the affairs of a debtor for the benefit of his creditors generally,¹ otherwise than in pursuance of the law for the time being in force relating to bankruptcy. Any such deed of arrangement is to be void unless registered within seven days of the execution, and unless duly stamped at the Bills of Sale Office of the Queen's Bench Division of the High Court of Justice. The stamp is one penny for every hundred pounds of the sworn value of the property passing (s. 6 (1)). A register of such deeds containing particulars is to be kept by the registrar for such deeds, who is also the registrar of bills of sale; and any person may search the register, for a shilling, and take an office copy or extract of the registered deed on the same terms as office copies of a judgment of the High Court. The High Court, or a judge thereof, has power to extend the time for registration, and to rectify accidental misstatement. If the debtor's place of business or residence is outside the London Bankruptcy District, the registrar is to transmit a copy of the deed to the registrar of the debtor's proper County Court.

¹ It is not an unknown thing for a debtor who finds himself unable to meet his engagements, to give his creditors bills at six months for the amount of their respective debts, and discount the bills at say 6s. 8d. in the pound. It seems very doubtful whether such a transaction would need to be registered under the Act.

The creditors to be scheduled to the debtor's affidavit are the creditors who are to take the benefit of the deed of arrangement, not the secured creditors (*Chaplin v. Daly*, 1894, 2 Manson, 1). A deed of arrangement, though void for want of registration or stamping, may still be given in evidence to prove an act of bankruptcy under sec. 4 (a) (*In re Hollinshead*, 1888, 6 Mor. Bky. 66). After three months the deed is unimpeachable as an act of bankruptcy (*In re Bamford*, 1879, 12 Ch. D. 314). The Bankruptcy Act, 1890, contains very important provisions with regard to deeds of arrangement. Every trustee under such a deed is, within thirty days of the first day of January in each year, to transmit to the Board of Trade an account of his receipts and payments in a prescribed form, and verified in the prescribed manner, and any creditor may inspect such accounts on payment of a fee. The effect of this is to draw such deeds within the sphere of official control, and make them part of the bankruptcy system. For, though the Board of Trade has no power of audit, it can set creditors in motion.

WORKING OF THE PRESENT SYSTEM.—How, then, has the system inaugurated by the Act of 1883 worked? Is it come to stay, or will it, like so many others that have gone before it, have its day and cease to be? So far as the future may be judged by the past, the bankruptcy system embodied in the Acts of 1883 and 1890 is the most efficient, the most economical, and the most just which this country has yet seen, and as such there seems every prospect that it will establish itself firmly. It represents a *via media*,—consulting, that is, the wishes and the interests of creditors, with just enough official control to prevent those abuses which spring up so easily from the supineness or self-seeking of creditors, the dishonesty of debtors, and the rapacity of trustees. It discriminates—which no previous system has done—between insolvency brought on by misconduct and insolvency due to misfortune; and by steadily discountenancing the one and dealing gently with the other, it insensibly purifies commercial morality. The vulnerable point of the system is the number of insolvent estates which are liquidated outside the Bankruptcy Court altogether. The total number of insolvencies,—the commercial wreckage,—for instance, in 1895, was 7858. Of these, 4396 were administered in bankruptcy, 3462 under deeds of arrangement,—in other words, nearly half. The explanation of this is to be found in two causes: First, the antipathy naturally felt by traders to the publicity of bankruptcy,—credit once tarnished in that Court seldom recovers its original brightness; and secondly, to the unpopularity of officialism with solicitors, who find a private arrangement far more acceptable than bankruptcy to themselves as well as to their clients. To legislate against arrangements which thus commend themselves to the trading community—to prohibit a debtor settling privately with his creditors, if he can—would be unjust and tyrannical. Such a course could only be justified by proof that private deeds of arrangement are extensively used to commit frauds on creditors, either from the apathy of creditors or the want of official control over the trustees; and no such evidence is forthcoming. On the contrary, the dividends are larger and the costs of administration less¹ under private deeds of arrangement than in bankruptcy; and though the body of creditors may be apathetic, there is seldom wanting one cantankerous creditor, who will satisfy himself that he is getting all that is to be got out of his debtor. The dissent of one such creditor is enough to upset the

¹ Costs under official administration are 23 per cent. of the estate; under non-official, 21.

whole arrangement. As to the trustees of such deeds, there is now an effectual guarantee for their *bona fides* in sec. 25 of the Bankruptcy Act, 1890, which empowers the Board of Trade to require from them a full account of their receipts and expenditure. On the whole, private deeds of arrangement usefully supplement the system as a legitimate alternative to bankruptcy. In judging any system of insolvent administration, this must always be remembered,—that insolvency, however admirably or adroitly the assets are administered, can never—from its nature—be quite satisfactory; not to the debtor certainly, nor to the creditors, nor to the State. All that can be done or hoped for in the most ideal system is (i.) to administer the assets expeditiously and economically; and (ii.) to severely discourage all irregular, reckless, or fraudulent trading. It can justly be claimed for the system now in operation that it does both these things.

Supplemental Notes.

